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REPORTS

OF THE

LIFE AND ACCIDENT INSURANCE CASES

DETERMINED IN THE COURTS OF

AMERICA, ENGLAND, IRELAND, SCOTLAND,
AND CANADA,

DOWN TO JANUARY, 1874.

WITH NOTES AND REFERENCES.

BY

MELVILLE M. BIGELOW,

OF THE BOSTON BAR.

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THE present volume embraces the cases decided since January, 1872, and also all the Scotch and Canadian cases of general interest, and such of the English and Irish cases as were not published in the second volume.

BOSTON, *March* 1, 1874.

TABLE OF CASES REPORTED.

	PAGE
Abbott v. Howard	294
Accidental Ins. Co., Reynolds v.	223
Ætna Life Ins. Co., Smith v.	708
Walsh v.	571
Allan, Campbell v.	392
American Tontine Life and Savings Ins. Co., Thompson v.	693
Amicable Mutual Life Ins. Co., Horn v.	712
Anderson, Bennett v.	342
Ankerstein, Tidswell v.	1
Anstruther, Wood v.	442
Armstrong v. Turquand	350
 Baring, Traill v.	 233
Barron v. Fitzgerald	12
Bennett v. Anderson	342
Bignold, Parsons v.	39
Blackwell, Henson v.	50
Borradaile, Dormay v.	57
Brade, Freme v.	182
British Empire Mutual Life Assurance Co., Shearman v.	271
White v.	251
British Equitable Ins. Co., Cazenove v.	202
v. Great Western Railway Co.	264
British Insurance Co. v. Magee	330
Browne, Pfeleger v.	213
Bruce v. Garden	255
Westropp v.	285
Burley, Gilly v.	167
Burridge v. Row	28
Burroughs, North American Life and Accident Ins. Co. v.	755
 Caledonian Ins. Co., Norris v.	 258
Cammack v. Lewis	826
Campbell v. Allan	392
Canada Life Assurance Co., Dowker v.	515
Cann, Supple v.	382
Cazenove v. British Equitable Ins. Co.	202
Champlin v. Railway Passenger Assurance Co.	736
Chattock v. Shawe	10
Coakley, Emerick v.	601
Coffey, Stokes v.	585
Cohen v. New York Mutual Life Ins. Co.	715
Collett v. Morrison	71
Connecticut Mutual Life Ins. Co., Welts v.	681
Wilkinson v.	565
Consolidated Investment Assurance Co., Jones v.	192

Continental Life Ins. Co. <i>v.</i> Willets	606
Cooper <i>v.</i> Pacific Mutual Life Ins. Co.	656
Cotton States Life Ins. Co., Sullivan <i>v.</i>	543
Cotton, Stevenson <i>v.</i>	463
Coulthurst, Hawkins <i>v.</i>	230
Courtenay <i>v.</i> Wright	98
Covenant Mutual Life Ins. Co., Gambs <i>v.</i>	653
Cranch, Gottlieb <i>v.</i>	86
Cunningham <i>v.</i> Smith	767
Curtin <i>v.</i> Jellicoe	389
Dillard <i>v.</i> Manhattan Life Ins. Co.	546
Dixon, United Kingdom Life Assurance Co. <i>v.</i>	424
Dormay <i>v.</i> Borradaile	57
Dowder <i>v.</i> Canada Life Assurance Co.	515
Downes <i>v.</i> Green	41
Drysdale <i>v.</i> Piggott	94
Duckett <i>v.</i> Williams	8
Duke, Edge <i>v.</i>	67
Dutton <i>v.</i> Willner	738
Edge <i>v.</i> Duke	67
Edinburgh Life Assurance Co., Forbes <i>v.</i>	394
Ellison, Grey <i>v.</i>	160
Emerick <i>v.</i> Coakley	601
English Assurance Co., <i>In re</i>	272
Equitable Life Assurance Society <i>v.</i> Paterson	534
Ferrier, M' Cormick <i>v.</i>	336
Fitzgerald, Barron <i>v.</i>	12
Flather, Gatayes <i>v.</i>	241
Forbes <i>v.</i> Edinburgh Life Assurance Co.	394
Foster <i>v.</i> Mentor Life Assurance Co.	113
Fowler <i>v.</i> Mutual Life Ins. Co.	673
Scottish Equitable Life Ins. Society	173
Franklin Life Ins. Co. <i>v.</i> Hazzard	559
Freme <i>v.</i> Brade	182
Gambs <i>v.</i> Covenant Mutual Life Ins. Co.	653
Garden, Bruce <i>v.</i>	255
Garner <i>v.</i> Moore	149
Gatayes <i>v.</i> Flather	241
Germania Life Ins. Co., Schwartz <i>v.</i>	619
Gibson-Craig <i>v.</i> M' Alpine	440
Gilly <i>v.</i> Burley	167
Gottlieb <i>v.</i> Cranch	86
Great Western Railway Co., British Equitable Ins. Co. <i>v.</i>	264
Green, Downes <i>v.</i>	41
Greenfield <i>v.</i> Massachusetts Mutual Life Ins. Co.	702
Grey <i>v.</i> Ellison	160
Halford <i>v.</i> Kymer	4
Hamilton <i>v.</i> Mutual Life Ins. Co.	787
Hardey, Triston <i>v.</i>	83
Harris, Murphy <i>v.</i>	289
Hawkins <i>v.</i> Coulthurst	230
Hazzard, Franklin Life Ins. Co. <i>v.</i>	559
Heiman <i>v.</i> Phoenix Mutual Life Ins. Co.	612
Henson <i>v.</i> Blackwell	50

TABLE OF CASES REPORTED.

vii

Hillyard v. Mutual Benefit Life Ins. Co.	661
Hincken v. Mutual Benefit Life Ins. Co.	711, 734
Hinton, Lea v.	92
Holdich's Case	272
Holland v. Smith	2
Horn v. Amicable Mutual Life Ins. Co.	712
Howard, Abbott v.	294
Hutchings v. Miner	686
Hutchinson v. National Loan Fund Life Assurance So.	444
Hutton v. Waterloo Life Assurance Co.	199
Insurance Co. v. Wilkinson	810
International Life Assurance Society, Martine v.	700
Isaac, Morland v.	156
Jellicoe, Curtin v.	389
Johnson v. Swire	225
Jones v. Consolidated Investment Assurance Co.	192
Knox v. Turner	106
Kugler, Succession of	592
Kymer, Halford v.	4
Lancaster's Case	272
Lea v. Hinton	92
Lemon v. Phoenix Mutual Life Insurance Co.	521
Lewis, Cammack v.	826
v. Phoenix Mutual Life Insurance Co.	527
Life Ins. Co., Mecke v.	747
Life Ins. Co. v. Terry	819
M'Alpine, Gibson-Craig v.	440
M'Cormick v. Ferrier	336
M'Dougle, Strachan v.	412
Magee, Schweiger v.	330
Mallory v. Travellers' Insurance Co.	696
Manhattan Life Insurance Co., Dillard v.	546
Martin v. Travellers' Insurance Co.	197
Martine v. International Life Assurance Society	700
Massachusetts Mutual Life Insurance Co., Greenfield v.	702
Mecke v. Life Insurance Co.	747
Medical, Invalid, and General Life Assurance So., Wemyss v.	487, 496, 499
Mentor Life Assurance Co., Foster v.	113
Miller, Mutual Benefit Life Insurance Co. v.	549
v. Mutual Benefit Life Insurance Co.	581
Minch, National Life Insurance Co. v.	690
Miner, Hutchings v.	686
Molineux, Neale v.	62
Moore, Garner v.	149
v. Woolsey	138
Morland v. Isaac	156
Morrison, Collett v.	71
Murphy v. Harris	289
Mutual Aid and Benevolent Life Insurance Association, Wetmore v.	592
Mutual Benefit Life Insurance Co., Hillyard v.	661
Hincken v.	711, 734
v. Miller	549
Miller v.	581
Wise v.	595

Mutual Life Insurance Co., <i>Fowler v.</i>	673
<i>Hamilton v.</i>	787
National Life Insurance Co. <i>v. Minch</i>	690
National Loan Fund Life Assurance So., <i>Hutchinson v.</i>	444
Neale <i>v. Molineux</i>	62
New York Life Insurance Co., <i>Mecke v.</i>	747
<i>Sands v.</i>	726
<i>Statham v.</i>	645
New York Mutual Life Insurance Co., <i>Cohen v.</i>	715
Norris <i>v. Caledonian Insurance Co.</i>	258
North American Life and Accidental Insurance Co. <i>v. Burroughs</i>	755
North British and Mercantile Insurance Co. <i>v. Stewart</i>	510
Nugent, <i>Shannon v.</i>	327
Pacific Mutual Life Insurance Co., <i>Cooper v.</i>	656
<i>Parsons v. Bignold</i>	39
<i>Patch v. Phoenix Mutual Life Insurance Co.</i>	777
<i>Paterson, Equitable Life Assurance Society v.</i>	534
<i>Pfleger v. Browne</i>	213
Phoenix Mutual Life Insurance Co., <i>Heiman v.</i>	612
<i>Lemon v.</i>	521
<i>Lewis v.</i>	527
<i>Patch v.</i>	777
<i>Price v.</i>	625
<i>Piggott, Drysdale v.</i>	94
<i>Price v. Phoenix Mutual Life Insurance Co.</i>	625
Queensberry <i>v. Scottish Union Insurance Co.</i>	428
Railway Passengers' Assurance Co., <i>Champlin v.</i>	736
<i>Rhodes v.</i>	677
<i>Ripley v.</i>	832
<i>Trew v.</i>	218
<i>Reed v. Royal Exchange Assurance Co.</i>	2
<i>Reis v. Scottish Equitable Life Assurance Society</i>	171
<i>Reynolds v. Accidental Insurance Co.</i>	223
<i>Rhodes v. Railway Passengers' Assurance Co.</i>	677
<i>Ripley v. Railway Passengers' Assurance Co.</i>	832
<i>Rose v. Star Insurance Co.</i>	346
<i>Ross, Sprott v.</i>	421
<i>Row, Burrridge v.</i>	28
<i>Royal Exchange Assurance Co., Reed v.</i>	2
<i>Sands v. New York Life Insurance Co.</i>	726
<i>Schwartz v. Germania Life Insurance Co.</i>	619
<i>Schweiger v. Magee</i>	330
<i>Scoles v. Universal Life Insurance Co.</i>	783
<i>Scottish Equitable Life Insurance Society, Fowler v.</i>	173
<i>Scottish Equitable Life Assurance Society, Reis v.</i>	171
<i>Scottish Union Insurance Co., Queensberry v.</i>	428
<i>Shannon v. Nugent</i>	327
<i>Shawe, Chattock v.</i>	10
<i>Shearman v. British Empire Mutual Life Assurance Co.</i>	271
<i>Smith, Cunningham v.</i>	766
<i>Smith v. Aetna Life Insurance Co.</i>	708
<i>Holland v.</i>	2
<i>Sprott v. Ross</i>	421
<i>Star Insurance Co., Ross v.</i>	346

ix

Statham v. New York Life Insurance Co.	645
Stevenson v. Cotton	463
Stewart, North British and Mercantile Insurance Co. v.	510
Stokes v. Coffey	585
Stormont v. Waterloo Life and Casualty Assurance Co.	196
Strachan v. M'Dougle	412
Sullivan v. Cotton States Life Insurance Co.	543
Supple v. Cann	382
Swire, Johnson v.	225
Terry, Life Insurance Co. v.	819
Thompson v. American Tontine Life and Savings Insurance Co.	693
Tidswell v. Ankerstein	1
Traill v. Baring	233
Travellers' Insurance Co., Mallory v.	696
Martin v.	197
Tredegar, Windus v.	242
Trew v. Railway Passengers' Assurance Co.	218
Triston v. Hardey	83
Trough, Estate of	750
Turner, Knox v.	106
Turquand, Armstrong v.	350
United Kingdom Life Assurance Co. v. Dixon	424
Universal Life Insurance Co., Scoles v.	783
Vyse v. Wakefield	17
Wakefield, Vyse v.	17
Walsh v. Ætna Life Insurance Co.	571
Waterloo Life Assurance Co., Hutton v.	199
Waterloo Life and Casualty Assurance Co., Stormont v.	196
Welts v. Connecticut Mutual Life Insurance Co.	681
Wemyss v. Medical, Invalid, and General Life Assurance Society	487, 496, 499
Westropp v. Bruce	285
Wetmore v. Mutual Aid and Benevolent Life Insurance Association	599
White v. British Empire Mutual Life Assurance Co.	251
Wilkinson v. Connecticut Mutual Life Insurance Co.	565
Insurance Co. v.	810
Willets, Continental Life Insurance Co. v.	606
Williams, Duckett v.	8
Willner, Dutton v.	738
Windus v. Tredegar	242
Wise v. Mutual Benefit Life Insurance Co.	595
Wood v. Anstruther	442
Woolsey, Moore v.	138
Wright, Courtenay v.	98

TABLE OF CASES CITED.

[CASES IN ITALICS ARE REPORTED IN THIS VOLUME.]

	PAGE
Acey v. Fernie, 7 M. & W. 151; <i>S. C.</i> , ante, vol. 2, p. 266	380, 385
Aldborough v. Toye, 7 Cl. & Fin. 436	187
Alexander's Cotton, 2 Wall. 404	647
Alexander v. Crosbie, Lloyd & G. temp. Sug. 150	178
v. Gardner, 1 Scott, 640	385
Amicable Society v. Bolland, 4 Bligh N. S. 194; <i>S. C.</i> ante, vol. 2, p. 240	144
Anderson v. Fitzgerald, 4 H. L. Cas. 484; <i>S. C.</i> , ante, vol. 2, p. 341	206,
208, 209, 210, 235, 266, 597, 684, 637, 715	53, 56,
Andrews, <i>Ex parte</i> ; Emett, <i>In re</i> , 1 Madd. 573; <i>S. C.</i> 2 Rose, 410	89, 96, 103
Andrews v. Essex F. & M. Ins. Co. 3 Mason, 6	660
v. Linton, 2 L. Raym. 884	292
Archibald v. Commissioners of Charitable Donations, 2 H. L. Cas. 440	240
Armstrong v. Turquand, p. 350	71
Arnsby v. Woodward, 6 Barn. & C. 519	362, 363, 364
Ashley v. Ashley, 3 Sim. 149	562
Attwood v. Munnings, 7 Barn. & C. 278	14
Axers v. Musselman, 2 P. A. Browne, 165	774
Ayers v. Hartford Ins. Co. 17 Iowa, 176	818
Bagaley, The William, 5 Wall. 377	407, 647, 794
Baker v. Union Life Ins. Co. 43 N. Y. 283; <i>ante</i> , vol. 2, p. 125	694, 695, 782
Ball v. Coggs, 1 Brown's Parl. C. 140	725
v. Storie, 1 Sim. & Stu. 210	40, 178
Barclay v. Wainewright, 14 Ves. 66	171
Barker v. Hodson, 3 Maule & S. 271	664
v. Walters, 8 Beav. 92, 96; <i>S. C.</i> 14 Law J. Ch. 37	266
Bartholomew v. Leach, 7 Watts, 472	743
Baxter v. Chelsea Mut. F. Ins. Co. 1 Allen, 294	579
Bayard v. Hoffman, 4 Johns. 452	589
Baylies v. Payson, 5 Allen, 473	725
Beal v. Park Ins. Co. 16 Wis. 241	818
Beaufort v. Morris, 2 Phil. 683	385
Bebee v. Hartford Ins. Co. 25 Conn. 51	818
Bedo v. Sanderson, Cro. Jac. 440	43
Bell's Case, Law Rep. 9 Eq. 706	274, 275, 276, 277, 281, 284
Bell v. Ansley, 16 East, 141	388, 339, 341
v. Chapman, 10 Johns. 183	183
Bennett v. Judson, 21 N. Y. 238	742
Beresford v. Beresford, 23 Beav. 16	261
Berly v. Taylor, 5 Hill, 577	688
Berrett v. Oliver, 7 G. & J. 191	603
Bevin v. Conn. Mut. Life Ins. Co. 23 Conn. 243; <i>S. C.</i> , ante, vol. 1, p. 19	531, 577

TABLE OF CASES CITED.

xi

Billiter v. Young, 6 Ell. & Bl. 1	354, 359, 360, 361, 364
Borradaile v. Hunter, <i>ante</i> , vol. 2, p. 280	58, 675, 677, 820, 821, 822, 824, 825
Borthwick v. Ralston, 15 Ct. Sess. Cas. 1st Series, 1306	423, 424
Boussmaker, <i>Ex parte</i> , 13 Ves. 71	729
Bradley v. Toder, Cro. Jac. 228	23
Bradwell v. Weeks, 13 Johns. 1 ; 7 Peters, 586	731
Brander v. Brander, 4 Ves. 800	171
Brandon v. Curling, 4 East, 417	666
Breasted v. Far. Loan & Trust Co. 4 Hill, 73 ; <i>S. C.</i> , <i>ante</i> , vol. 1, pp. 674, 675	822
Brewster v. Kitchin, 1 Ld. Raymond, 317	722
Bridges v. Hunter, 1 Maule & S. 15	303
British Industry Life Assurance Co. v. Ward, 17 C. B. 644	354, 385
Brophy v. Holmes, 2 Molloy, 9	385
Brown v. Freeman 4 De G. & Sm. 444	96, 113, 258
v. Tolles, 7 Cal. 398	658
Brundige v. Poor, 2 G. & J. 1	603
Brune v. Rawlings, 7 East, 29	286
Buchanan v. Curry, 19 Johns. 140	649, 729, 730, 732, 733
Buckbee v. U. S. Ins. & Trust So. 18 Barb. 541 ; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 406	577
Bufo v. Turner, 6 Taunt. 338	300, 302, 303, 322
Burdett v. Hay, 9 Jur. N. S. 1260	235
Burr v. Beers, 24 N. Y. 178	689
Burridge v. Row, p. 28	86, 158, 261, 271
Bush v. Shipman, 14 Sim, 239	216, 217
Busteed v. West of England Ins. Co. 5 Irish Ch. 574	385
Buxton v. Buxton, 1 Mylne & Cr. 80	150
v. Lister, 3 Atk. 383	725
Byrne v. Kenniffeck, Batty, 269	340
Campbell v. N. Eng. Life Ins. Co. 98 Mass. 381 ; <i>S. C.</i> , <i>ante</i> , vol. 1 p. 229	559, 564, 597, 629, 630, 631, 635, 636, 655, 693, 715
v. Penn. Life Ins. Co. 2 Whart. 64	743
Carpenter v. Mut. Safety Ins. Co. 4 Sandf. Ch. 408	660
v. Williamson, 25 Cal. 158	658
Carter v. Boehm, 3 Burr. 1905	300, 303, 314
Cazenove v. <i>British Equitable Ins. Co.</i> p. 202	637
Chaffee v. Cattaraugus Co. Fire Ins. Co. 18 N. Y. 376	630
Chattock v. Shave, p. 10	348, 568
Chesterfield v. Jansen, 1 Wils. 286	49, 339
Chew v. Beall, 13 Md. 360	603
Clack v. Holland, 19 Beav. 262	96, 261, 271
Clark v. Inhabitants of the Hundred of Blything, 2 B. & C. 254	53
Clarke v. Morey, 10 Johns. 73	728, 729, 730, 731
Clift v. Schwabe, <i>ante</i> , vol. 2, p. 312	61, 253, 676, 821
Clopton v. N. Y. L. Ins. Co. 7 Bush, 199 ; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 709	732, 734
Coates v. Gerlach, 8 Wright, 45	754
Cohen v. Hannam, 5 Taunt. 106	334, 340, 341
Cohen v. <i>New York Life Ins. Co.</i> p. 715	548
Cole v. Iowa State Mut. Ins. Co. 18 Iowa, 425	579
Coleman v. Waller, 3 Younge & Jer. 212	215, 217
Collett v. Morrison, 9 Hare, 162	518
Collins v. Ins. Co., Flanders on Ins. 104	615
Combee's Case, Moore, 759	825
Combs v. Hannibal Savings & Ins. Co. 48 Miss. 148	816
Commercial M. Ins. Co. v. Union M. Ins. Co. 19 How. 318	678
Conn v. Penn, Peters C. C. 496	649, 733, 804

Connecticut Life Ins. Co. v. Burroughs, 34 Conn. 305; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 63	605
Conover v. Mut. Ins. Co. 1 Comst. 290	564
Cook v. Black, 1 Hare, 390	143, 195
Cooke v. Husbands, 11 Md. 503	603
Coombe, <i>Ex parte</i> , 17 Ves. 370; 2 Bell, 23	416
Cooper v. Mass. Life Ins. Co. 102 Mass. 227	822
Countess of Shelburne v. Inchiquin, 1 Bro. C. C. 338	178
Courtenay v. Wright, p. 98	109, 110, 113, 257
Courtney v. Ferrers, 1 Sim. 137	171
Cousins v. Nantes, 3 Taunt. 513	328, 329, 332, 334
Cox v. Aetna Ins. Co. 29 Ind. 586	556
Craufurd v. Hunter, 8 T. R. 13	339
Crawford's Appeal, 11 P. F. Smith, 53	751, 752
Crosbie v. Free, Craig & Ph. 64	34
Crozier v. Young, 3 T. B. Monroe, 158	590
Cullingworth v. Loyd, 2 Beav. 385	214, 215, 216
Cumber v. Wane	215
Cumberland C. & I. Co. v. Sherman, 3 Barb. 553	743
Cumberland v. Codrington, 3 Johns. Ch. 261	689
Cumming v. Boswell, 2 Jur. N. S. 1005	171
Da Costa v. Jones, 2 Cowp. 734	333
Dakin v. Cope, 2 Russ. 174	362
Dalby v. India & L. Life Ins. Co. 15 C. B. 365; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 371	55, 89, 96, 109, 112, 158, 329, 564, 605
Dalglish v. Jarvie, 2 Mac. & G. 231, 243; <i>S. C.</i> 20 Law J. 475	266
Dallman v. King, 4 Bing. N. C. 105	144
Daniels v. Hudson River F. Ins. Co. 12 Cush. 423	630
Davenport v. Peoria Ins. Co. 17 Iowa, 276	818
Davis v. Thomas, Russ. & M. 506; <i>S. C.</i> 9 Law J. Ch. 232	70
Davoue v. Fanning, 2 Johns. Ch. 252	743
Dean v. Am. Life Ins. Co. 4 Allen, 96	676, 821, 822
Dennison v. Imbrie, 3 Wash. C. C. 396	650, 730, 733
Deposit Co. v. Ayscough, 6 Ell. & B. 761	354, 370
Dexter v. Adams, 2 Denio, 646	742
Didsbury v. Thomas, 14 East, 323	287
Dillard v. Manhattan Life Ins. Co. p. 546	672, 725, 734
Dobson v. Land, 8 Hare, 216	187
Doe v. Bancks, 4 B. & Ald. 401	362, 363
v. Whitehead, 8 Ad. & Ell. 571; 3 Nev. & Per. 557	21
Doe d. Didsbury v. Thomas, 14 East, 323	287
Doe d. Grimes v. Gouch, 3 B. & Ald. 664	48
Doe d. Metcalf v. Brown, Holt N. P. 295	339
Doe d. Small v. Allen, 8 T. R. 148	315
Doe d. Titford v. Chambers, 4 Campb. 1	48, 341
Domville v. Lamb, V. C. Wood, 9 March, 1853	171
Dormay v. Borradaile, p. 57	232
Doughty v. Neal, 1 Saund. 216, note 2	722
Down v. Hatcher, 10 Adol. & E. 121	215
Downes, <i>Ex parte</i> , 18 Ves. 290	37
Doyle v. Sleeper, &c. 1 Dana, 532	587
Drysdale v. Piggott, p. 88	102, 103, 104, 105, 109, 110, 113, 187, 228, 261
Duckett v. Williams, p. 8	211, 408, 424, 452, 453, 459, 460
Dufaur v. Professional Life Assur. Co. 25 Beav. 599	194, 252
Duke of St. Albans v. Ellis, 16 East, 352	60
Duke of Beaufort v. Morris, 2 Phil. 683	385
Durrell v. Bederley, Holt N. P. C. 283	307

TABLE OF CASES CITED.

xiii

<i>Eadie v. Slimmon</i> , 26 N. Y. 11, 15, 17, 18, <i>S. C.</i> , ante, vol. 1, 567	604
<i>Edge v. Duke</i> , p. 67	382, 389
<i>Eggington, Ex parte</i> , Mont. 72	37
<i>Elderton v. Lack</i> , 2 Phil. 680	385
<i>Ellen v. Topp</i> , 6 Exch. 424	354
<i>Elliott's Executors' Appeal</i> , 50 Penn. 75; <i>S. C.</i> , ante, vol. 1, p. 672	586
<i>Esposito v. Bowden</i> , 4 El. & B. 963; <i>S. C.</i> , 7 Ib. 763	794
<i>Estabrook v. Union Ins. Co.</i> 54 Maine, 224	822
<i>Everett v. Desborough</i> , 5 Bingh. 503; ante, vol. 2, p. 326	302, 321, 322, 323, 566
<i>Exchange Bank v. Rice</i> , 107 Mass. 37	42, 564, 689
<i>Farley v. Cleveland</i> , 4 Cowen, 432	689
<i>Farran v. Ottiwell</i> , 10 Cl. & Fin. 319	354
<i>Fawcett v. Gee</i> , 3 Anst. 910	215
<i>Fenn v. Harrison</i> , 3 T. R. 757, 762	14
<i>Ferday v. Wightwick</i> , 1 Russ. & M. 45	340
<i>Ferguson v. Carrington</i> , 9 B. & C. 59	354
<i>Fitch v. Sutton</i> , 5 East, 230	215
<i>Fitzherbert v. Mather</i> , 1 T. R. 12	300, 303
<i>Fletcher v. Pynsett</i> , Cro. Jac. 102	23
<i>Flindt v. Waters</i> , 15 East, 260	719
<i>Flinn v. Tobin</i> , Moody & M. 367	301, 303, 308, 326
<i>Ford v. Ryan</i> , 4 Irish Ch. 347	390
<i>Forster v. Hale</i> , 3 Ves. Jr. 696; 5 Ves. 308	158
<i>Fortescue v. Barnett</i> , 3 Mylne & K. 36	229
<i>Foster v. Roberts</i> , 29 Beav. 467	271
<i>Fountain v. Grymes</i> , Cro. Jac. 252	339
<i>Fowkes v. Manchester and London Life Assur. Co.</i> 3 Best & S. 917; <i>S. C.</i> , ante, vol. 2, p. 631	267
<i>Franklin Life Ins. Co. v. Hazzard</i> , p. 559	655
<i>Frazer v. Jones</i> , 5 Hare, 475	261
<i>Freeman v. Auld</i> , 44 N. Y. 55	689
<i>v. Cook</i> , 2 Exch. 654	136, 372
<i>v. Guion</i> , 11 Smedes & M. 62	646
<i>v. People</i> , 4 Denio, 9	825
<i>Freme v. Brade</i> , p. 96	109, 256, 257, 258
<i>Frost v. Saratoga Mut. Ins. Co.</i> 5 Denio, 154	577
<i>Furtado v. Rogers</i> , 3 Bos. & Pul. 191	730
<i>Gardner v. Ogden</i> , 22 N. Y. 327	743
<i>Garrett v. Noble</i> , 6 Sim. 504	150
<i>Gates v. Madison Co. Ins. Co.</i> 1 Seld. 478	737
<i>Gay v. Union Mut. Life Insurance Co.</i> , ante, vol. 2, p. 4	822
<i>Geach v. Ingall</i> , 14 M. & W. 95	344, 345, 347, 348, 557, 638, 639
<i>Gibson v. D'Este</i> , 2 Y. & C. C. C. 542	240
<i>Gilbert v. Sykes</i> , 16 East, 155	335
<i>Glynn v. Docke</i> , 3 Dr. & War. 11; <i>S. C.</i> 5 Irish Eq. 61	390
<i>Godsall v. Boldero</i> , 9 East, 72	15, 53, 55, 56, 57, 89, 158, 328, 329, 332, 334, 335, 605
<i>Goit v. Nat. Protection Ins. Co.</i> 25 Barb. 190	617
<i>Good v. Elliott</i> , 3 T. R. 699	333
<i>Gooden v. Amoskeag Fire Ins. Co.</i> 20 N. H. 73	70
<i>Goodright v. Davids</i> , 2 Cowp. 803	362, 363, 364
<i>Gordon v. Gordon</i> , 3 Swanst. 400	302
<i>Gottlieb v. Cranch</i> , p. 86	96, 97, 102, 104, 109, 110, 112, 113, 158, 160, 187, 192
<i>Gray v. Murray</i> , 3 Johns. Ch. 167; <i>S. C.</i> , ante, vol. 2, p. 91	156, 746
<i>v. Sims</i> , 3 Wash. C. C. 280	648
<i>Grey v. Pearson</i> , 6 H. L. Cas. 106	358, 373

Griswold v. Waddington, 16 Johns.	438	650, 718, 728, 729
Grosvenor v. Atlantic Fire Ins. Co.	17 N. Y.	391 697
Grove v. Bastard, 2 Phil. Eng. Ch.	619	724
Gulliver v. Gulliver, 1 H. & N.	174	172, 385
Gunnis v. Erhart, 1 H. Bl.	289	310
Hale v. Mechanics' Mut. F. Ins. Co.	6 Gray,	169 579
Hales v. Petit, Plowd.	253	61
Halford v. Kymer, p.	4	253
Hall v. Marston, 17 Mass.	575	688
v. Wright, El., B. & El.	746	664
Hamilton v. Lycoming Ins. Co.	5 Barr,	339 660
Hamilton v. Mut. Life Ins. Co.	p. 787	548, 652, 723, 732, 734
Hammersley v. De Biel, 12 Cl. & Fin.	45	236
Hanger v. Abbott, 6 Wall.	532	647, 718, 722, 723, 794
Harmon v. Fleming, 25 Miss.	142	647
v. Kingston, 3 Camp.	150	719
Harper v. Minor, 27 Cal.	107	658
Harrington v. Price, 3 B. & Ad.	170	65
Harrison v. McConkey, 1 Md. Ch.; S. C., ante, vol. 1, p.	144	603
Hart v. Clarke, 6 De G., M. & G.	232; S. C. 6 H. L. Cas.	663 96, 97
Hartman v. Keystone Ins. Co.	21 Penn. St.	466 821
Haule v. Hemyng, Cro. Jac.	422	26, 27
Haverley v. Loughton, 1 Bulstr.	12	24
Haywood v. Rodgers, 4 East,	590	301, 303, 312, 314, 323
Head v. Egerton, 3 P. Wms.	280	65
Headen v. Rosher, M'Clel. & G.	89	187
Heathcote v. Crookshanks, 2 T. R.	24	215
Heiman v. Phoenix Life Ins. Co.	p. 612	622
Henkle v. Royal Exch. Assur. Co.	1 Ves. Sen.	317 178
Henning's Case, Cro. Jac.	432	23
Henson v. Blackwell, p.	50	187
Herbert v. Tuckal, T. Raym.	84	286, 288
Herr's Appeal, 5 W. & S.	494	752
Herron v. Peoria M. & F. I. Co.	28 Ill.	238 630
Higham v. Ridgway, 10 East,	109	287
Hill v. Trenery, 23 Beav.	16	261
Hillyard v. Mut. Benefit Life Ins. Co.	p. 661	548
Hodsdon v. Guardian Life Ins. Co.	97 Mass.	144; S. C., ante, vol. 1, p. 218 719
Hodson v. Observer Life Assur. Society, 8 E. & B.	40	516, 517, 519
Hogle v. Guardian L. Ins. Co.	4 Abb. Pr. N. S.	346; S. C., ante, vol. 1, p. 597 693
Holland v. Smith, p.	2	53, 89
Horford v. Wilson, 1 Taunt.	12	288
Horwitz v. Equitable Ins. Co.	40 Mo.	557 818
Hovenden v. Annesley, 2 Schoales & L.	630	385
Howard v. Hudson, 2 E. & B.	1	136
Howard Express Co. v. Wile, 14 P. F. Smith,	201	776
Howard Ins. Co. v. Bruner, 11 Harris,	50	818
Hoyt v. Mut. Ben. Life Ins. Co.	98 Mass.	544; S. C., ante, vol. 1, p. 253 616, 617
Huguenin v. Rayley, 6 Taunt.	186; S. C., ante, vol. 2; p.	208 300, 307, 318
Hull v. Cooper, 14 East,	479	300
Humphrey v. Arabin, Lloyd & Gould temp. Plunket,	308	53, 56, 89
Hunter v. Gibbons, 1 H. & N.	459	172, 385, 387
Hutchinson v. Wilson, 4 Bro. C. C.	488	162, 166
Hyde v. Watts, 12 Mees. & W.	254	354, 362, 385

TABLE OF CASES CITED.

xv

Inledon v. Crips, 2 Salk. 659; S. C. Mod. 87; 2 Ld. Raym. 814	335
Innes v. Equitable Assur. Co.	6
Insurance Co. v. Johnson, 11 Harris, 72	615
v. Slockbower, 26 Pa. St. 199	577
v. Wilkinson, p. 810	571
Jackman v. Mitchell, 1 Ves. Sr. 581	215
Jecker v. Montgomery, 18 How. 110	718
Jeffs v. Wood, 2 P. Wms. 128	34
Jemison v. McDaniel, 25 Miss. 83	647
Jessel v. Williamsburg Ins. Co. 3 Hill, 88	564
Johnson v. Dodgson, 2 M. & W. 653	131
v. Johnson, 15 Jurist, 714	171
Jones v. Consolidated Investment Assur. Co. p. 192	252
Jones v. Judd, 4 Comstock, 412, 413	808
v. Provincial Ins. Co. 3 Com. B. N. S. 65; S. C., ante, vol. 2, p. 431	267, 270
Jorden v. Money, 5 H. L. Cas. 185	235
Kain v. Old, 2 B. & C. 627; 4 Dowl. & Ry. 52	301, 311
Karth v. Light, 15 Cal. 326	657
Keech v. Sandford, 3 Eq. Cases Abr. 741	743
Kelly v. Commonwealth Ins. Co. 10 Bosw. 82	679
Kelner v. Le Mesurier, 4 East, 395	730
Kerman v. Howard, 23 Wis. 108, vol. 1, p. 728	655
Kershaw v. Kelsey, 100 Mass. 561	718, 730, 733
Ketchum v. Protection Ins. Co. 1 Allen (N. B.), 136	71
Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157; S. C., ante, vol. 1, p. 261	605
Knight v. Crockford, 1 Esp. 190	123
Kohne v. Ins. Co. North America, 1 Wash. C. C. 93	659
Koontz v. Nabb, 16 Md. 549	603
Lacey, <i>Ex parte</i> , 6 Ves. 625	745
Lancaster's Case (Albert Arbitration)	272, 277
Lancaster, <i>Ex parte</i> , 4 De G. & S. 444	113, 187
Lapham v. Western Assur. Co. 13 Up. Can. Q. B. 237	71
Larkin v. McMullin, 13 Wright, 34	754
Law v. London Indisputable Life Policy Co. 1 K. & J. 223; S. C., ante, vol. 2, p. 404	109, 153, 605
v. Warren, 1 Drewry 31	187
Lawley v. Hooper, 3 Atk. 278	340
Lawrence v. Fox, 20 N. Y. 268	689
v. Twentiman, 1 Roll. Ab. 450	663
Lea v. Hinton, p. 92	96, 97, 102, 103, 104, 105, 109, 110, 113, 158, 187, 191, 192
Leathers v. Com. Ins. Co. 2 Bush, 298	648
Le Blan v. Harrison, Holt, 706	48
Lee v. Lockhart, 3 Myl. & Cr. 302	215
Leete v. Gresham Life Ins. Co. 15 Jur. 1161	630
Leicester v. Rose, 4 East, 372	216
Leonard v. Leonard, 2 Ball & B. 171	302
Lightbody v. North Am. Ins. Co. 23 Wend. 18	678, 680
Lincoln v. Wright, 4 De G. & J. 16	235
Lindenau v. Desborough, 8 B. & C. 586; S. C., ante, vol. 2, p. 216	300, 302, 303, 308, 321, 322, 323, 324, 325
Lobb v. Stanley, 5 Q. B. 574	123
Loffus v. Maw, 3 Giff. 592; 8 Jur. N. S. 607	235
Loomis v. Eagle Life Ins. Co. 6 Gray 396; S. C., ante, vol. 1, p. 175	2, 531

Lord v. Dall, 12 Mass. 115 ; <i>S. C.</i> , ante, vol. 1, 154	531, 540
Lowe v. Waller, 2 Dougl. 736	48
Lowry v. Bourdieu, 2 Dougl. 468	393
Luce v. Izod, 1 H. & N. 245	172
Lucena v. Craufurd, 3 Bos. & P. 75, 101	328, 332, 334
Lycoming Ins. Co. v. Schollenberger, 8 Wright, 259	818
Lynch v. Dunsford, 14 East, 494, 497	306, 322, 323
v. Hamilton, 3 Taunt. 37	303, 322, 323
Macdowall v. Fraser, Dougl. 260	303
McCullough v. Eagle Ins. Co. 1 Pick. 278	660
McGregor v. Imbrick	649
McKee v. Phoenix Ins. Co. 28 Mo. 383 ; <i>S. C.</i> , ante, vol. 1, p. 306	654
MacKenzie v. Powis, 7 Bro. P. C. (Toml.)	382
MacKimm v. Riddle, 2 Dall. 100	774
McLoon v. Com. Mut. Ins. Co. 100 Mass. 474	630
Malins v. Freeman, 4 Bing. N. C. 398	366
Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 614 ; <i>S. C.</i> , ante, vol. 2, p. 168	548, 652, 672, 723, 732, 734, 794, 808
Markey v. Mut. Ben. Ins. Co. 103 Mass. 93 ; <i>S. C.</i> , ante, vol. 2, p. 57	614, 615, 616
Mathews v. Howard Ins. Co. 1 Kern. 9	737
Maynard v. Rhodes, 5 Dowl. & Ry. 266	300, 320, 322
Mellen v. Whipple, 1 Gray, 317, 322	689
Metcalf v. Brown, Holt N. P. 295	339
Michael v. Baker, 12 Md. 169	603
Miles v. Conn. Mut. Life Ins. Co. 3 Gray, 580 ; <i>S. C.</i> , ante, vol. 1, p. 173	566, 633, 713
Miller v. Brooklyn Life Ins. Co., ante, vol. 2, p. 35 ; <i>Ib.</i> p. 737	71
v. Mut. Ben. Life Ins. Co., ante, vol. 2, p. 693	635
Mills v. Gore, 20 Pick. 35	615
Milne v. Marwood, 24 Law J. C. P. 36	210
Mitchell v. Union Life Ins. Co. 45 Maine, 104 ; <i>S. C.</i> , ante, vol. 1, p. 137	2
Moore v. Garwood, 4 Exch. 681	122, 136
v. Moore, 5 N. Y. 256	743
Morel v. Miss. Valley Life Ins. Co. 4 Bush, 535 ; <i>S. C.</i> , ante, vol. 1, p. 116	737
Morey v. Clark, 10 Johns. 69	649
Morland v. Isaac, p. 156	187, 256
Morrison v. Muspratt, 4 Bingh. 60	300, 308, 309, 319, 321
Morton v. Tewart, 2 Y. & Col. Ch. 67	741
Motteux v. London Assur. Co. 1 Atk. 545	80, 178
Mountfort, <i>Ex parte</i> , 14 Ves. 606	416
Mowry v. Home Ins. Co. 9 R. I. 346 ; <i>S. C.</i> , ante, vol. 1, p. 698	564
Mullen v. Wilson, 8 Wright, 416	754
Murphy v. Harris, p. 289	289
Murray v. Harding, 2 Bl. 859	339
v. Mann, 2 Exch. 540	354
Mutual Ben. Life Ins. Co. v. Wise, 34 Maryland	635
Mutual Protection Ins. Co. v. Hamilton, 5 Sneed, 269 ; <i>S. C.</i> , ante, vol. 1, p. 709	603
Myers v. United Guarantee Society, 7 De G., M. & G. 112	96
Neilson v. Blight, 1 Johns. Cas. 205	689
Newman v. Jenkins, 10 Pick. 515	774
New York Life Ins. Co. v. Clopton, 7 Bush, 179 ; <i>S. C.</i> , ante, vol. 2, p. 709	548, 652, 672, 719, 723, 796, 799, 808
v. Flack, 3 Md. 341, 351 ; <i>S. C.</i> , ante, vol. 1, p. 146	603
Nicholson v. Whalley, 6 De G., M. & G. 232	97

TABLE OF CASES CITED.

xvii

Nimick v. Insurance Co. 10 Am. Law Reg. N. S. 102 ; <i>S. C.</i> , ante, vol. 1, p. 689	822
Norcutt v. Dodd, Craig & P. 100	590
Norris v. Caledonian Ins. Co., ante, p. 258	271
v. Harrison, 2 Madd. 268	171
North Berwick Co. v. New Eng. Ins. Co. 52 Maine, 336	576
Northrup v. Railway Passengers' Assur. Co. 43 N. Y. 576; <i>S. C.</i> , ante, vol. 2, p. 129	737, 833
Odiorne v. New Eng. Mut. Mar. Ins. Co. 101 Mass. 551	71
Odlin v. Ins. Co. 2 Wash. C. C. 317	667, 721
O'Reilly v. Mut. Life Ins. Co. 2 Abb. Pr. N. S. 167; <i>S. C.</i> , ante, vol. 2, p. 97	548
Otter v. Vaux, 2 K. & J. 650; 6 De G., M. & G. 638	261
Ouachita, The, 6 Wall. 521	718
Outram v. Morewood, 5 T. R. 121	287
Owen v. Davies, 1 Ves. Sr. 82	61
Page v. Fry, 2 B. & P. 240	340
Palm v. Medina Ins. Co. 20 Ohio, 529	660
Paradine v. Jane, Aleyn, 26	664
Paris v. Paris, 10 Ves. 185	171
Parker v. Parker, 1 Gray, 409	618
Parkes v. Bott, 9 Sim. 388	169, 171
Partridge v. Gopp, Ambl. 596	586
Paul v. Christie, 4 Harris & McH. 161	650
v. Virginia, 8 Wall. 168, 181	864
Pawson v. Watson, 2 Cowp. 785	301, 312, 316, 323
People v. Bartlett, 3 Hill, 570	722
v. Manning, 8 Cow. 297	664
v. Tubbs, 37 New York, 586, 588	808
Perkins v. Washington Ins. Co. 4 Cowen, 645	679
Phillips v. Eastwood, Lloyd & G. temp. Sugd. 270	53, 89, 103, 257
Pickard v. Sears, 6 Ad. & E. 469	122, 127, 133, 136, 372
Pickering v. Dawson, 4 Taunt. 779	301, 311
Piggott v. Stratton, 1 De G., F. & J. 33	235
Pincke v. Thornycroft, 4 Bro. P. C. (Toml.) 92	385
Pitt v. Berkshire Ins. Co. 100 Mass. 500; <i>S. C.</i> , ante, vol. 1, p. 284	782
Plumb v. Cattaraugus Insurance Co. 18 N. Y. 392	816
Plumstead's Appeal, 4 S. & R. 545	751
Plunkett v. Mansfield, 2 Jones & L. 344	171
Polglass v. Oliver, 2 Crompt. & J. 15	734
Polhill v. Walker, 13 B. & Ad. 114	210
Pomeroy v. Manhattan Life Ins. Co. 40 Ill. 402; <i>S. C.</i> , ante, vol. 1, p. 46	604
Potts v. Bell, 8 T. R. 348	719
v. Curtis, Younge, 543	187
Powell v. Edmunds, 12 East, 6	310
Powle v. Hagger, Cro. Jac. 492	23
Pratt v. Hull, 13 Johns. 335	659
Price v. Anderson, 15 Sim. 473	171
v. Bigham, 7 H. & J. 296	603
Priddy v. Rose, 3 Mer. 86	34, 36
Prince of Wales, &c., Association Co. v. Palmer, 25 Beav. 605	268
Prize Cases, 2 Black, 635, 687	717, 721, 729
Protector, The, 9 Wall. 687	729, 732
Purcell v. Purcell, 2 Dru. & War. 223, n.	261
Rankin v. Barnard, 5 Madd. 32	34
Rapid, The, 8 Cranch, 155	717

Rawlins v. Desborough, 2 Moody & R. 328; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 271 .	693
Rawls v. American Life Ins. Co. 27 N. Y. R. 282; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 558 .	526, 697, 699
Raybold v. Raybold, 8 Harris, 308 .	752
Rede v. Farr, 6 M. & S. 121 .	362, 363
Reed v. Royal Exchange Assur. Co. p. 2 .	8
Reeves v. Livingstone, 3 Johns. Ch. 497 .	588
Reid v. Hoskins, 4 El. & B. 979 .	794
Rex v. Drury, 2 Lev. 7 .	339
v. Holland, 5 T. R. 607 .	20
v. Inhabitants of Erith, 8 East, 539 .	287, 288
Reynell v. Sprye, 1 De G., M. & G. 708; 15 Jur. 1046 .	240, 266
Richards v. Brown, 2 Cowp. 770 .	48
v. Murdock, 10 B. & Cr. 527 .	300, 302
Right v. Price, 1 Doug. 241 .	130
Rigno v. Binns, 10 Peters, 269 .	743
Ripley v. Aetna Ins. Co. 30 N. Y. 136, 164 .	70
Ripley v. Railway Pass. Assur. Co. p. 832 .	737
Roberts v. Davey, 4 B. & Ad. 664 .	362, 363, 364
Robertson v. Dumaresq, 2 Moore P. C. N. S. 66 .	232
v. French, 4 East, 130 .	301, 309
v. St. John, 2 Bro. C. C. 140 .	96
Robinson v. Amps, T. Raym. 25 .	59
v. International Life Assur. Co. 42 N. Y. 34; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 748 .	548, 672, 701, 733, 734
Roe d. Brune v. Rawlings, 7 East, 290 .	286, 287
Ross v. Bradshaw, 1 W. Bl. 312; 2 Marsh. Ins. 793 .	301, 312, 323, 403, 406, 408, 412, 423, 452, 569
Rowley v. Empire Ins. Co. 36 N. Y. 550 .	816, 818
Ruse v. Mut. Ben. Life Ins. Co. 26 Barb. 556; 23 N. Y. 516; <i>S. C.</i> , <i>ante</i> , vol. 1, pp. 467, 472 .	561, 719
Sadlers' Company v. Babcock, 2 Atk. 564 .	328, 329
St. John v. Amer. Mut. Life Ins. Co. 13 N. Y. 31; <i>ante</i> , vol. 1, p. 372 .	562
St. Louis Life Ins. Co. v. Graves, 6 Bush, 268; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 736 .	821
St. Louis Mut. Ins. Co. v. Kennedy, 6 Bush, 450; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 753 .	614, 618
Salkeld v. Vernon, 1 Eden, 64 .	302
Sandford v. Trust F. Ins. Co. 11 Paige, 547 .	618
Sands v. New York Life Ins. Co. p. 726 .	548, 717
Saunderson v. Jackson, 2 B. & P. 238 .	123
Savings Bank v. Charter Oak Ins. Co. 31 Conn. 517 .	818
Scanlon v. Sceales, 6 Irish Law, 367 .	344, 345
Schneider v. Provident L. Ins. Co. 24 Wis. 28; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 731 .	737
Scott v. Brest, 2 T. R. 238 .	48
Scruggs v. Blair .	646
Seaman's Society v. Hopper, 33 N. Y. 619 .	825
Secor v. Lord, 3 Keyes, 525 .	689
Selway v. Fogg, 5 M. & W. 83 .	354
Semmes v. Hartford Fire Ins. Co. 13 Wall. 158 .	548, 723, 729, 733
Shannon v. Nugent, p. 327 .	339, 340
Sheldon v. Atlantic Ins. Co. 26 N. Y. 460 .	617
v. Conn. Mut. Life Ins. Co. 25 Conn. 207; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 27 .	617
Shilling v. Accidental Death Ins. Co. 2 H. & N. 42; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 428 .	16
Shirley v. Wilkinson, Dougl. 306, n. .	303
Simeral v. Dubuque Mut. Ins. Co. 18 Iowa, 319 .	578
Simpson v. Accidental Death Assur. Co. 2 C. B. N. S. 257 .	354, 372

TABLE OF CASES CITED.

xix

Simpson v. Mountain, 4 Law J. Ch. 221	171
Sinclair v. Maritime Passengers' Assurance Co. 7 Jur. N. S. 367; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 596	220, 221
Slim v. Croucher, 1 De Gex, F. & J. 518	267
Sloper v. Cottrell, 26 Law J. Q. B. 10	354, 385
Small v. Allen, 8 T. R. 148	315
Smedley v. Roberts, 2 Campb. 607	48
Smith v. Smith, 1 Y. & C. 338	34, 35, 36
Solicitors' and General Life Assur. Co. v. Lamb, 2 De Gex, J. & S. 251	252, 253
Solomon, <i>Ex parte</i> , 1 G. & J. 25	37
Sondes v. Fletcher, 5 B. & Ald. 835	232
Soule v. Union Bank, 45 Barb. 111	156, 746
Southcombe v. Merriman, Carr. & M. 286; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 305	347
Statham v. New York Life Ins. Co. p. 645	548
Stevens v. Hatch, 6 Minn. 74	615
v. Warren, 101 Mass. 564; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 297	562
Stevenson v. Newnham, 13 C. B. 302	354
Stiffe v. Everitt, 1 Myl. & Cr. 37	53
Stout v. Fire Ins. Co. of New Haven, 12 Iowa, 383	566
Strachan v. M'Dougle, p. 412	426, 427
Swete v. Fairlie, 6 Carr. & P. 1; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 244	453, 463
Tanfield v. Finch, Cro. El. 27	332
Tayloe v. Merch. Fire Ins. Co. 9 How. 390	614, 660
Taylor v. Knox, 1 Dana, 395	743
Thomas v. Courtnay, 1 Barn. & Ald. 1	215, 217
Thornton v. Knight, 16 Sim. 509	266
Tiernan v. Poor, 1 Gill & J. 216	603
Titford v. Chambers, 4 Campb. 1	48, 341
Toomey v. London, Brighton & South Coast Ry. Co. 3 C. B. N. S. 146	221
Touteng v. Hubbard, 3 B. & P. 291	722
Traill v. Baring, p. 233	266, 267, 269, 270
Treadway v. Hamilton Mut. Ins. Co. 29 Conn. 68	579
Trew v. Railway Passengers' Assurance Co. p. 218	224
Triston v. Hardey, p. 83	158, 187, 256, 257
Trotter v. White, 10 Smedes & M. 612	646
Tyerman v. Smith, 6 El. & B. 17	372
Tyrie v. Fletcher, 2 Cowp. 666	393
Underhill v. Harwood, 10 Ves. 225	239
United States v. Grossmayer, 9 Wall. 75	650, 728, 733, 804
v. Wiley, 11 Wall. 508	729, 732
Valton v. Nat. Life Assur. Soc. 22 Barb. 39; <i>S. C.</i> 20 N. Y. 32; <i>ante</i> , vol. 1, pp. 409, 436	540, 562, 699
Van Buren v. Digges, 11 How. 461, 479	805
Van Schaick v. Third Ave. R. R. 38 N. Y. 346	689
Varnish, <i>Ex parte</i> , 1 Mont., D. & De G. 514	89
Vaughan v. Wood, 1 Mylne & K. 403	171
Veazie v. Williams, 8 How. 134	742
Viall v. Genesee Mut. Ins. Co. 19 Barb. 440	576
Viele v. Germania Ins. Co. 26 Iowa, 9	576, 577
Vorley v. Barrett, 1 C. B. N. S. 225	172
Vose v. Eagle Life Ins. Co. 6 Cush. 42; <i>S. C.</i> , <i>ante</i> , vol. 1, p. 161	557, 713
Wainwright v. Bland, 1 Mees. & W. 32; <i>S. C.</i> , <i>ante</i> , vol. 2, p. 250	542
Wall v. Buffalo Waterworks, 18 N. Y. 119	735
Walsh v. Ætna Life Ins. Co. p. 571	71

Want v. Blunt, 12 East, 183; <i>S. C.</i> , ante, vol. 2, p. 200	672
Ward v. Combe, 7 Sim. 634	171
<i>v.</i> Smith, 7 Wall. 452	650, 730, 733, 804
Watson v. Mainwaring, 4 Taunt. 763	423, 452, 569
<i>v.</i> Sutton, 1 Salk. 272	292
Weaver v. Ward, Hob. 134	61
West v. Blakeway, 3 Scott N. R. 216	354
<i>v.</i> Reid, 2 Hare, 249	96, 261
Weston v. Barker, 12 Johns. 276	688, 689
Wheeler v. Billings, 38 N. Y. 263	705
Wheelton v. Hardisty, 8 El. & B. 232; <i>S. C.</i> , ante, vol. 2, p. 447	10, 693
Whitbread, <i>Ex parte</i> , 1 Rose, 299	416
White v. Garden, 10 C. B. 919	354
Whitney v. Ind. Mut. Ins. Co. 15 Md. 326	605
Wigglesworth v. Dallison, 1 Doug. 201	122
Wilde v. Gibson, 1 H. L. Cas. 705	235, 240
Wilkinson v. Conn. Mut. Life Ins. Co. p. 565	814
Williams v. Atkyns, 2 Jones & L. 603	89
<i>v.</i> Bank of United States, 2 Peters, 96	805
<i>v.</i> Fitch, 18 N. Y. 546	688, 689
<i>v.</i> Lloyd, W. Jones, 179	664
Willis v. People, 32 N. Y. 719	825
<i>v.</i> Poole, Marsh. Ins. 774 (3d ed.)	312, 323, 423, 449
Wilson v. Conway Fire Ins. Co. 4 R. I. 143	631
<i>v.</i> Hampden Ins. Co. 4 R. I. 159	630, 641
Winchester's Case, 6 Rep. 23	825
Wing v. Harvey, 5 De Gex, M. & G. 265; <i>S. C.</i> , ante, vol. 2, p. 365	354,
366, 369, 370, 372, 374, 375, 376, 380, 381, 577	131
Winsor v. Pratt, 2 Brod. & B. 650	630
Witherell v. Maine Ins. Co. 49 Maine, 200	171
Witts v. Steere, 13 Ves. 363	722, 808
Wolfe v. Howes, 20 N. Y. 197	172, 173, 388
Wood v. Dwarries, 11 Exch. 493; <i>S. C.</i> , ante, vol. 2, p. 418	722
<i>v.</i> Edwards, 19 Johns. 205	816
Woodbury Savings Bank v. Charter Oak Ins. Co. 31 Conn. 526	728
Woods v. Wilder, 43 N. Y. 167	34, 36
Woodyatt v. Gresley, 8 Sim. 180	241
Wool v. Marjoribanks, 3 De G. & J. 329	83
Wright, <i>Ex parte</i> , 19 Ves. 257	48
Wright v. Wheeler, 1 Campb. 165, n.	
York Building Co. v. McKenzie, 8 Bro. Parl. C. (Toml.) App. 42	743

LIFE AND ACCIDENT INSURANCE CASES.

ENGLAND.

TIDSWELL *vs.* ANKERSTEIN.

(Peake, 151. King's Bench, N. P. 1792.)

Interest.—An executor in trust has a sufficient interest to enable him to make assurance in his own name on the life of a person who has granted an annuity to the testator.

THIS action was brought on a policy of insurance on the life of William Holden, late of Shuttleworth, from the 17th of August, 1790, to the 17th of August, 1791, both days inclusive, and during the life of the plaintiff; but in case the plaintiff should depart this life before William Holden, the policy to be void.

Holden had granted an annuity to the plaintiff's late brother; which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make assurance.

Erskine, for the defendant, objected that the plaintiff had not such an interest as enabled him to insure this life. The real interest is in the persons to whom the annuity is bequeathed, and the act of parliament¹ directs, that all insurances shall be made for the benefit of the person insured. Here the insurance is made by a person having no beneficial interest; and had the plaintiff died before the person whose life is insured, the insurance would have been gone.

Lord KENYON said, he thought this a sufficient interest to support the action. The plaintiff could not assent to the legacy before the testator's debts were paid, without being guilty of a *devastavit*; and being executor, all the interest of the testator vests in him.

The cause proceeded, but it appearing that Holden was in a dying state when the policy was effected, the defendant had a verdict.

¹ 14 Geo. 3, c. 48, §§ 1, 2, 3.

REED vs. ROYAL EXCHANGE ASSURANCE COMPANY.

(Peake's Add. Cas. 70. King's Bench, N. P. 1795.)

Wife's interest in husband. — A wife making an insurance on her husband's life need not prove that she was interested therein.

COVENANT on a policy of insurance on the life of William Reed, the plaintiff's late husband, for £2,000.

The policy was effected on the 11th of April, 1795, and Reed died on the 17th of the same month.

Having put in the policy, and called the widow to prove the health of Reed at the time the policy was made, and his subsequent death, the plaintiff's counsel were proceeding to prove that Reed was entitled to the interest of a large sum of money, which went from him at his death, and therefore that the plaintiff was interested in his life.

But Lord KENYON said it was not necessary, as it must be presumed that every wife had an interest in the life of her husband.

Erskine opened the defendants' case, and on hearing the facts stated by him, particularly a letter from the plaintiff to a young man of her acquaintance, it was thought prudent by the plaintiff's counsel (*Mingay & Gibbs*) to consent to a nonsuit.

The plaintiff was afterwards indicted at Gloucester assizes for the murder of her husband, and acquitted.

Note.—In the subsequent case of *Halford v. Kymer*, *post*, p. 4, it was decided that section 3 of the statute of 14 Geo. 3, c. 48, prohibiting wager policies, had reference to a pecuniary interest, and therefore that a parent as such had no insurable interest in the life of his minor child. That doctrine would doubtless cover the above case. But *Halford v. Kymer* has not been recognized as authority, at least in America. See *Loomis v. Eagle Life Ins. Co.* 6 Gray, 396; *S. C.*, *ante*, vol. 1, pp. 175, 178; *Mitchell v. Union Life Ins. Co.* 45 Maine, 104; *S. C.*, *ante*, vol. 1, p. 137.

HOLLAND, ESQ., executor of O'Hara, vs. SMITH, executor of Kendrick.

(6 Esp. 11. King's Bench, N. P. 1806.)

Insurance on debtor's life. Title to policy. — Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premiums to the account of the debtor, who pays them, if the principal is afterwards paid, the debtor, or his representative, is entitled to the policy.

THIS was an action for money had and received. Plea of *non assumpsit*.

This action was brought to recover a sum of £150 under the following circumstances :—

A person of the name of O'Hara in his life-time had been a captain in the navy ; the defendant's testator, Kendrick, had been his agent ; having become indebted to Kendrick, and having no security to give, Kendrick had effected a policy on his life for £150 at the Pelican Insurance Office. O'Hara died in the year 1802. The money due from O'Hara to Kendrick had been paid, and Kendrick being then dead, and the office liable on the policy, the defendant was called upon by the plaintiff, as executor of O'Hara, for the policy, or the value of it.

The defendant refused to deliver up the policy, and relied upon his right to hold it, on the ground that having been called upon by the office, previous to O'Hara's death, to pay the premium, he had paid it, in order to preserve the policy on the event of O'Hara's death taking place.

The defendant afterwards applied for the amount of the insurance, and it had been paid by the office. The present action was therefore brought to recover the amount of the insurance on O'Hara's life, so paid to defendant.

It was contended for the defendant, that O'Hara never had any interest in the policy ; that it had been merely effected by Kendrick for his own security to cover, in the event of O'Hara's death, the money due to him by O'Hara ; that no interest in it could therefore pass to O'Hara's executor, and that he could therefore maintain no action for what never could belong to the testator's estate.

To rebut this position the plaintiff proved, that during the number of years the policy subsisted, which was from 1797, though Kendrick had paid the money for the premiums at the office, he had regularly charged it in account with O'Hara, and O'Hara had paid him.

Garrow, on these facts, put it to Lord Ellenborough, for his lordship's opinion, whether upon the evidence there could be said to be any title to the policy, or money produced by it, in the representative of O'Hara.

Lord ELLENBOROUGH ruled, that the premium having been paid by O'Hara, it must be taken that he meant to keep the

Halford v. Kymer.

policy alive for his own benefit ; that whatever property he had in it devolved upon the plaintiff, as his representative ; if indeed the money due by O'Hara to Kendrick had not been discharged, Kendrick, or his representative, would have had a right to hold the policy for his own security, and to liquidate his own debt by its produce ; but as that debt was discharged he could have no claim to the policy ; the money he had recovered on it belonged to O'Hara, or his representative, by whom the premiums had been paid.

Verdict for the plaintiff, deducting the premium last paid.

Sir *V. Gibbs & Puller* for the plaintiff.

Garrow & Espinasse for the defendant.

See *Morland v. Isaac*, 20 Beav. 389 ; *S. C.*, ante, vol. 2, p. 414 ; *Henson v. Blackwell*, post, 50 ; *Gottlieb v. Cranch*, post, 86, and note.

RICHARD HALFORD vs. KYMER *et al.*

(10 Barn. & C. 724. King's Bench, 1830.)

Father's interest in minor child. — The statute 14 Geo. 3, c. 48, by section 1 enacts, "that no insurance shall be made on lives, or any other event, wherein the person for whose benefit the policy shall be made shall have no interest, and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life, or other event." Held, that in order to render a policy valid within the meaning of this act, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured ; and that therefore a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was void.

THIS was an action of covenant on a policy of insurance, dated the 13th of February, 1826, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of Robert Bargrave Halford, the son of the plaintiff, in the sum of £5,000, for the term of two years, and covenanted that if Robert Bargrave Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the company should be liable to pay, within six calendar months after proof of the death of the said Robert Bargrave Halford within the said term of two years, unto the said Richard Halford, his executors, &c., the sum of £5,000. Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said Robert Bargrave Halford ; secondly, that at the time of the death

of the said Robert Bargrave Halford, the plaintiff was not interested in his life. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared from the statement of the plaintiff's counsel, that by a settlement, dated the 18th of May, 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of £8,000 and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives, in trust for the children or child of the said marriage, according to the appointment of the said plaintiff, and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; and if no child of the said marriage, or issue of such child, should become entitled to the vested interest in the said trust moneys, then upon such trusts as the said S. T. Bargrave should appoint; and in default of her appointment, in trust for her next of kin, as if she had died intestate and unmarried. There was only one child of the marriage, namely, Robert Bargrave Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by act of parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, Robert Bargrave Halford, before he attained the age of twenty-one. The said Robert Bargrave Halford did attain the age of twenty-one years on the 2d of June, 1827, and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the plaintiff, his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, proved his son's will in the prerogative court of the Archbishop of Canterbury. Upon this statement of facts, Lord Tenterden was of opinion that the plaintiff, not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the statute 14 Geo. 3, c. 48, s. 3, and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict if the court should be of opinion that he had an insurable interest.

F. Pollock now moved accordingly. It is quite clear that, but for the statute 14 Geo. 3, c. 48, this policy would be available. That statute, by sect. 1 enacts, "that no insurance shall be made

by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expenses of his maintenance and education. This, clearly, was not a wagering policy within the meaning of that clause. It is true that the third section enacts, "that in all cases where the assured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events." It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and although his own income may be of the most ample kind, not depending on his own exertions or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son or his wife? If a man be deprived of the comfort, society, and assistance of his wife by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely the law which gives a man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty which forever deprives him of that assistance. [BAYLEY, J. In *Innes v. The Equitable Assurance Company*, (which was tried before Lord Kenyon,) the plaintiff had effected a policy on the life of his daughter. In order to show that he had an interest, he produced a paper, purporting to be a will, by which it appeared that he was entitled to the sum of £1,000 in the event of his daughter dying under the age of twenty-one. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses; but another of those witnesses stated that it was not made at Glasgow, but by a school-

master in the borough. Innes was tried, convicted, and executed for the forgery, and Gardiner, who had sworn that the will was made at Glasgow, was convicted of perjury. — Lord TENTERDEN, C. J. It was in effect admitted, in that case, that it was necessary to prove that the father had a pecuniary interest in the life of his daughter, otherwise there would have been no occasion to go into the question as to the will; and unless it were a fact material in the case, the witness could not have been convicted of perjury.] That was only a *nisi prius* case. But a father has a legal interest in the life of his son sufficient to entitle him to insure. By the statute of Elizabeth, if a father became poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminishes the chance of his being paid. So, if a son dies, the chance of the father being maintained in poverty and old age is diminished. [BAYLEY, J. The parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son.] The amount of maintenance which a parish must afford may, in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on his son, when he has no claim on the parish. He may not be able to show his settlement in the parish from which he claims relief. In that case the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word “interest” in the act of parliament is not to be confined in construction to pecuniary interest, but may be taken to mean legal interest; and the third section, which allows the insured to recover to the amount or value of his interest, shows that the law would recognize an interest of any kind, provided a value can be set upon it.

Lord TENTERDEN, C. J. I retain the opinion which I expressed at the trial, that the word interest in this statute means pecuniary interest.

BAYLEY, J. It is enacted by the third section, “that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives.” Now what was the amount or value of the interest of the party insuring in this case? Not one farthing, certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son

Duckett v. Williams.

some property to dispose of, make an insurance in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better.

LITTLEDALE and PARKE, JJ., concurred.

Rule refused.

See note to *Reed v. Royal Exchange Assur. Co.*, ante, p. 2.

DUCKETT vs. WILLIAMS.

(2 Crompt. & M. 348. Exchequer, 1834.)

Health. Untrue statement. — By a declaration and statement as to health, &c., signed by the assured, previous to effecting a policy on a life, it was agreed, that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and the assurance be absolutely null and void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it. *Held*, that the premiums were forfeited, and could not be recovered back.

THIS was an action on a policy of insurance on the life of one John Stephenson, brought by the Provident Life Assurance Company against the Hope Insurance Company. The following declaration and agreement had been signed on behalf of the plaintiffs before making the insurance: —

“We, Scrope Bernard Morland and George Duckett, trustees of the Provident Life Office, do hereby declare and set forth, that the herein named John Stephenson is now in good health, and has not labored under gout, dropsy, fits, palsy, insanity, affection of the lungs or other *viscera*, or any other disease which tends to shorten life, and that his age does not exceed forty-one years; that we have an interest in the life of the said John Stephenson to the full amount of £5,000; and we agree that the declaration or statement hereby made shall be the basis of the agreement between ourselves and the Hope Assurance Company; and that if any untrue averment be contained therein, or if the facts required to be set forth in the above proposal be not truly stated, all moneys which shall have been paid upon account of the assurance, made in consequence hereof, shall be forfeited, and the assurance itself be absolutely null and void.”

The defence was that the life was not insurable ; and the jury upon the trial, having found that it was not insurable, the court discharged a rule which had been obtained for a new trial on the ground of the verdict being against the evidence. In the course of the discussion it was argued that the plaintiffs were at all events entitled to a return of premiums. The plaintiffs had not claimed a return of premiums at the trial ; but it was subsequently agreed that a second action should be tried to determine the point. On the second trial the jury went into the question whether the life was insurable or not, and were of opinion that the life was insurable, and found for the plaintiffs. A rule for a new trial having been obtained by *Pollock*, on behalf of the defendants, the question was argued by the

Solicitor-General & Kelly, for the plaintiffs, and by
F. Pollock & R. V. Richards, for the defendants.

It was finally agreed that the court should look at the evidence, and draw their own conclusions as to the facts. As the judgment of the court proceeded entirely on the meaning of the expressions “untrue account,” and “not truly stated,” in the declaration and agreement signed by the parties, it is not necessary to state the arguments.

Cur. adv. vult.

The judgment of the court was now delivered by

Lord LYNTHURST, C. B. This was an action on a policy of insurance on the life of John Stephenson. Upon his death an action was brought to recover the amount of the sum insured. The defendants' case was, that the life was not insurable at the time of the insurance ; and the jury being of that opinion, the defendants had a verdict. The court were of opinion that they ought not to disturb that verdict. On the discussion of the rule for a new trial, it was contended that the plaintiffs were entitled to a return of the premiums, if the life were not insurable ; but it turned out that the counsel had omitted to claim the return of the premiums at the trial. It was subsequently arranged that this question should be tried in another action. On a motion for a new trial in the second action, it was agreed that the court should look into the evidence, and form their own conclusions as to the matters of fact. We have done so ; and we have come to the conclusion that, at the time when the policy was effected, Mr. Stephenson had upon him a disease which tended to shorten life. It follows, that the facts set forth in the proposal were not truly

Chattock v. Shawe.

stated, and the question then turns entirely on the construction of the declaration and agreement made by the assured before the policy was effected. The point is, whether the facts stated were not truly stated within the meaning of the declaration and agreement. It was contended, on behalf of the plaintiffs, that the words must mean "truly" or "untruly" within the knowledge of the party making the statement; and that if the party insuring ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue because the party making it is not apprised of its untruth; and looking at the context, we think it clear that the parties did not mean to restrict the words in the manner contended for. Two consequences are to follow if the statement be untrue: one, that the premiums are to be forfeited; the other, that the assurance is to be void. Now, if the statement were untrue, within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and, therefore, must be so as to the first; for it would be contrary to all rules of construction to hold that it was material as to one consequence, and not as to the other. We are, therefore, of opinion, that these premiums are forfeited under the clause in question, and that a nonsuit must be entered.

Rule absolute for a nonsuit.

See *Wheelton v. Hardisty*, 8 El. & B. 232; *S. C.*, ante, vol. 2, p. 447, and note.

CHATTOCK vs. SHAWE & others.

(1 Moody & R. 498. Exchequer, N. P. 1835.)

Warranty. Fit. Accident. — Where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to, gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy it must be shown that the constitution of the assured was naturally liable to fits, or by accident or otherwise had become so liable.

ASSUMPSIT. This was an action on a policy of insurance effected by the plaintiff, and signed by the defendants as directors of the Eagle Insurance Company, in July, 1831, upon the life of Lieutenant-colonel Greswolde. Plea, the general issue.

The policy recited that the plaintiff had delivered to the office a certain statement or declaration, touching the said Lieutenant-colonel Greswolde, wherein it was (amongst other things) alleged that the assured "is now in a sound and perfect state of health, and has not been afflicted with, nor is subject to, gout, vertigo, fits, hemorrhage, dropsy, asthma, consumption, or to any disease, ailment, or bodily infirmity, nor accustomed to any intemperate habits, which can tend to the shortening of life;" and the policy contained a proviso that the insurance was to be valid only in case the declaration above referred to contained a true and faithful representation of the facts therein mentioned.

Colonel Greswolde died in January, 1833.

For the defendants it was attempted to be shown that the policy was void on two grounds: first, because at the time it was effected Colonel Greswolde was accustomed to very intemperate habits of drinking, which tended to the shortening of life; secondly, because he had been afflicted with and was subject to fits.

In respect to the fits, it was admitted in the plaintiff's opening that in the year 1827 the colonel had been attacked by a seizure, said to be of an epileptic character, whilst quartered at Macclesfield, and by a second seizure of the same kind a few days after; it was also attempted to be shown, on the part of the defendants, that the colonel had been frequently afflicted with similar seizures between the occurrence at Macclesfield and the date of the policy, and from thence to the time of his death, the immediate cause of which was stated to be a fit of some kind, at a time when he was keeping his bed, and laboring under a dangerous attack of some species of cholera. The evidence as to the fits (except the two at Macclesfield and that which took place immediately before the colonel's death) was, however, of a very doubtful, and frequently of a contradictory nature; and as to the Macclesfield fits, the plaintiff gave evidence that they were the immediate result of an accident which happened to the colonel in a scuffle, in the course of which he either fell, or was cast down some stone steps, and received a very severe injury in the head, — the colonel having been free from all tendency to fits up to this time, and never having experienced any recurrence of them (as the plaintiff contended) since.

Lord ABINGER, C. B., in his address to the jury, after commenting on the evidence as to the alleged intemperate habits of

Barron v. Fitzgerald.

Colonel G. proceeded thus: If the only fits of which proof were given had been the Macclesfield fits, I should have said there was no breach of this warranty; for the interpretation I put on a clause of this kind is, not that the party never accidentally had a fit, but that he was not, at the time of the insurance being made, a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural or contracted from some cause or other during life. You are to say whether the evidence has satisfied you that these fits at Macclesfield were the result of an accident and did not lead to any recurrence of fits in after life, or whether you think that the defendants have shown that the colonel was attacked by other seizures of the same kind after the Macclesfield fits; because if the evidence as to those is to be depended upon, they not being pretended to be the result of any accident, would seem to show that the party was, from the date of the Macclesfield fits, a person subject to that disorder within the meaning of the proviso.

Verdict for the plaintiff.

Talfourd, Sergt., Thesiger, Cresswell & Robinson, for the plaintiff.

Sir J. Campbell, A. G., Sir F. Pollock, Erle, Sir W. Follett, R. V. Richards & Beetham, for the defendants.

In Michaelmas term following, a rule nisi for a new trial was obtained on the ground that the verdict was against evidence. No objection was made to the direction of the learned Lord C. B., and, in the course of the argument, PARKE, B., expressed his concurrence therein. The rule was afterwards discharged.

BARRON vs. FITZGERALD.

(6 Bing. N. C. 201. Common Pleas, 1840.)

Insurance on life of debtor. Premiums.—B. and S. having been directed by defendant to effect an insurance on his life in his own name or in the names of B. and S., to whom he was indebted, effected an insurance in the names of B. and S., and a third person, whom they had taken into partnership. *Held*, that they had no authority for effecting the insurance in the three names; and defendant having never acknowledged the transaction, that they could not recover from him the amount of premiums paid on the policy.

ASSUMPSIT for money paid in respect of premiums on a policy of insurance. Plea, *non assumpsit*.

It appeared at the trial, that on the 26th of April, 1832, the defendant addressed the following letter to the plaintiff, Barron, and his then partner, Stewart :—

“I have to request that you will pay the premium for an insurance on my life for £200 for seven years, and continue the future payment for the same on my account. This insurance being chiefly to secure your debt you can have the policy effected in your own names, it being understood that when I shall be clear with you it is to be reassigned to me; and in the event of my death before you shall have been paid off, it is my wish that the surplus, after you are satisfied, be paid over to Edward Parrott, in whose debt I am the sum of £100.”

The policy was effected in the names of Barron and Stewart, who paid the premiums on the 27th of April, 1832, and 27th April, 1833. In August, 1833, the defendant paid off the whole of Barron and Stewart's claim, and had no further dealings with them. They omitted, however, to assign the policy to him.

In September, 1833, the defendant went to the West Indies; and in November, Barron and Stewart paid the additional premium for the sea risk, but omitted to pay the annual premium in April, 1834.

However, in November, 1834, they renewed the policy in the names of Barron, Stewart, and Smith, who at that time had become a member of the firm; made a declaration that all three were interested in the life of the defendant; and afterwards paid the premiums down to 1838, when Stewart having died, and the defendant having refused to acknowledge the renewed policy, the plaintiff commenced this action, as survivor of the firm of Barron and Stewart.

At the trial, the plaintiff produced the first policy, but failed to call the attesting witness; the learned judge, however, who presided, admitted the document in evidence, notwithstanding objections made to its reception; and the payments in respect of the renewed policy having been proved, it was left to the jury to say,—

Whether Barron and Stewart were authorized to renew the policy;

Whether they were authorized to renew it in the names of Barron, Stewart, and Smith;

Whether they renewed it for the entire partnership; and

Whether the premiums were paid by Barron and Stewart.

A verdict was found for the plaintiff for the amount of the premiums paid on the renewed policy, with leave for the defendant to move to enter a nonsuit instead, if the court should be of opinion that the first policy ought not to have been received in evidence, or that Barron and Stewart had no authority to effect the renewed policy.

A rule nisi having been obtained accordingly on those grounds,

W. H. Watson, who showed cause, contended that, as the plaintiff sought to recover only the premiums paid in respect of the renewed policy, proof of the policy effected in April, 1832, was unnecessary; as to the objection that the renewed policy had been effected in the names of Barron, Stewart, and Smith, instead of Barron and Stewart only, the effect of the defendant's letter of April, 1832, was to authorize an insurance to be made for his own benefit; it was immaterial in whose names; the persons named, whoever they might be, would be trustees for the defendant; and as the authority was to effect an insurance for seven years, it was the plaintiff's duty, when the first policy expired in consequence of his omission to pay the second year's premium, to effect a renewed policy for the remaining five years. The verdict given had established the authority to renew the policy, and to renew it in the names of Barron, Stewart, and Smith.

Bompas, Sergt. & *Petersdorff*, in support of the rule, argued that, without proof of the first policy, which ought not to have been received without calling the attesting witness, the plaintiff could not explain on what authority he had effected the renewed policy; that the authority contained in the letter of April, 1832, ought to have been strictly pursued; Com. Dig. Attorney, C. 11, 13; *Fenn v. Harrison*,¹ *Attwood v. Munnings*;² and that the effecting the renewed policy in the names of Barron, Stewart, and Smith, instead of the names of Barron and Stewart, was a departure from the authority in a material particular, and might have been greatly prejudicial to the defendant; the two in whom he had confidence might have died, and have left him in the power of the third, who might have been an entire stranger; the third might have been in a foreign country, and his absence might have cast impediments in the way of any assignment of the policy; or, if the defendant's executor were sued by the executor of the survivor

¹ 3 T. R. 757, 762.

² 7 Barn. & C. 278.

of the two, for a debt due to the two, the third having received the amount of the policy, the defendant's executor could not set off against such demand the money so received by the third. Further than this, the renewed policy was void, for after payment of their debt, Barron and Stewart had no interest in the defendant's life. *Godsall v. Boldero*.¹ But if it was properly effected in the name of the three, then Smith should have joined in the action.

BOSANQUET J. This is an action brought by Barron, who has survived his partner, Stewart, to recover the amount of premiums paid on a policy of insurance effected, as the plaintiff alleges, by order of the defendant. In April, 1832, Barron and Stewart being the agents of the defendant, he ordered them to effect an insurance on his life for seven years; a policy was obtained accordingly, which at the end of two was suffered to lapse; in the mean time Barron and Stewart had taken Smith into partnership, and in November, 1834, effected another policy for the remainder of the term of seven years in the names of Barron, Stewart, and Smith, for the amount of the premiums paid on which this action is brought.

To launch the plaintiff's case, the first policy was offered in evidence without calling the attesting witness; the defendant objected to its reception on the ground of the absence of that witness, but the instrument was read notwithstanding. It is now contended on the part of the plaintiff that it was not material to his case, as he sued only for the amount of premiums paid on the renewed policy: but the first policy was produced and shown to the jury; the object of the plaintiff was to prove that the policy for five years was a continuation of the policy which was suffered to expire at the end of two; and it is impossible to say that the jury did not take it into consideration when they were called on to say whether or not there was any authority for effecting the insurance; it would be a ground for a new trial, therefore, that the instrument was read without calling the attesting witness.

But the other objection goes to a nonsuit. The plaintiff was ordered to effect a policy in the name of the defendant, or of Barron and Stewart; the policy in respect of which he sues is

¹ 9 East, 72.

effected in the names of Barron, Stewart, and Smith; and the question is whether the defendant's letter of April, 1832, authorized the plaintiff to effect the policy in those names. It appears to me that it did not; and as there was no subsequent communication, nor any adoption of the policy, the premiums have been paid on the plaintiff's own account. It has been argued that it is immaterial in whose names the policy was effected, as it must still enure to the defendant's benefit; but the question is, whether he authorized such a policy; and whether the difference in the names might not seriously affect his interests. One way has been shown in which it might. If Barron and Stewart had both died, Smith, as survivor, might have received the money, or released the insurance office, to the inconvenience of the defendant's executor.

I think, therefore, that the insurance was not according to the power, and that the rule for a nonsuit must be absolute.

ERSKINE, J. I am of the same opinion on both points. It may be that the plaintiff might have dispensed with the production of the first policy; but whether he might or not, as it was actually read to the jury, and they considered it in their verdict, the cause must go down again if it was not receivable in evidence, which it was not, the attesting witness not having been called. A new trial, however, becomes unnecessary, because the rule for entering a nonsuit must be made absolute. If the authority had been to effect the policy in the names of Barron and Stewart or others, it might not have been necessary that Smith should join in the action, because he might not have had authority to pay the premium; but the order was to effect the policy in the names of Barron and Stewart, or of the defendant, and the addition of another name might have been most material to him. If the plaintiff and defendant had both died, Smith might have had to receive the amount of the policy; and then, if the plaintiff's executor had sued the defendant's, he could not have set off the money in the hands of Smith.

MAULE, J. If the plaintiff chose to give the first policy in evidence, he could not dispense with the attesting witness; and without giving that policy in evidence, he could not show a ground for effecting the second. But I agree also that the plaintiff must be nonsuited, because the letter of April, 1832, gave him no authority to pay the premiums for which he now seeks to recover: .

 Vyse v. Wakefield.

that letter authorized him to pay premiums on a policy in the names of Barron and Stewart, and for the benefit of those two. I should not be disposed to construe such an authority very strictly ; but the insertion of another name might make a great difference to the defendant, and therefore the policy should have been effected in the names specified by him. As the authority has been exceeded, the rule for a nonsuit must be made *Absolute*.

TINDAL, C. J., was absent at Monmouth.

 VYSE vs. WAKEFIELD.

(6 Mees. & W. 442. Exchequer, 1840.)

Breach of covenant as to travel. — The declaration stated, that, by indenture, the defendant covenanted that he would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him ; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America. *Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected.

COVENANT on an indenture, dated the 3d of March, 1827, whereby the defendant, in consideration of £3,100, bargained, sold, and assigned to the plaintiff certain dividends, interest, and annual produce, from time to time due and payable, or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her ; to have, hold, receive, and take the dividends, &c., thereby assigned unto the plaintiff, his executors, &c., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her ; and the defendant did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, amongst other things, that he, the defendant, should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or

before the agent or agents of any such office or offices in the county where he the defendant might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him the defendant; and should not afterwards do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever, whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, amongst other things, appear. And the plaintiff says, that he the defendant, in part performance of his said covenant, did afterwards, to wit, on the 8th day of March, 1827, at the request of the plaintiff, appear at an office for the insurance of lives within London, that is to say, the office of a certain company of persons, or office established for the purpose, and carrying on the trade or business of and for the insurance of lives, under the name of, and called and known by the name of, the Rock Life Assurance Company, and did then and there answer certain questions then asked and required of him, touching and concerning his age and state of health, and did then do all other necessary acts, in order to enable the plaintiff to insure the life of him the defendant in and with the said company or office, he the plaintiff then thinking proper and intending to insure the life of him the defendant in and with the said company or office, according to the course and practice of the said company or office; the answering such questions as aforesaid, and the said other matters in that behalf aforesaid, being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he the plaintiff did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office, by a certain policy or insurance, at and for the premium of £81 17s. 6d., payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and sat-

isfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of £3,000, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus to that policy, subject to and under the condition or proviso, amongst others, that in case the defendant should go beyond the limits of Europe, the same should be null and void ; and the plaintiff says, that the said condition or proviso, at the time of making the said indenture, and from thence hitherto, was and is usual and reasonable ; and that although he the plaintiff has performed and observed everything in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid, in this, to wit, that he the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he the plaintiff had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant, had amounted to a large sum, to wit, £2,000, and had become of great value to the plaintiff, to wit, the value of £2,000, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of £3,000, to wit, on the first day of June, 1838, he the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises, the said policy became and was null and void, &c., &c.

Special demurrer, assigning for cause that the declaration does not contain any specific averment that the defendant, before he went beyond the limits of Europe, as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact that the plaintiff had insured the life of the defendant, as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged ; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the

policy had been effected, and that it was subject to the condition or proviso stated in the declaration.

Peacock, in support of the demurrer, was stopped by the court, who called upon

Cowling, to support the declaration. The declaration is sufficient. It was not necessary to allege any notice to the defendant; for the declaration states that the defendant did, at the request of the plaintiff, appear at the Rock Life Assurance Office, and did answer certain questions put to him; and he might, therefore, have informed himself of the fact of the insurance having been effected and the terms and conditions of it. The general rule is, that a party is not bound to do more than the terms of his contract oblige him to do; and here there is nothing in this covenant requiring him to give any notice. Therefore, unless the circumstances were such that the defendant had not any means of informing himself of it, no notice was necessary. This contract to insure is confined to insurance offices within the bills of mortality; and the defendant might readily have informed himself by inquiry of the fact of the insurance having been effected, and of the terms and conditions of it. In Com. Dig. tit. Condition, L. 9, many instances are given where parties are not bound to give notice, but the other parties must take notice at their peril. It is there said: "If a condition, covenant, or promise be to do an act to a stranger, or upon performance of an act by a stranger, there needs no notice; for it lies equally in the knowledge of the obligor and the obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A marries, there needs no notice when A marries. So if a condition, covenant, or promise be to do upon the performance of any certain and particular act by the obligee himself, he ought to do it without notice by the obligee that the act is performed; for he takes it upon him to do it at his peril: as if the condition be to pay so much when the obligee marries, there need not be notice of his marriage." Notice is not necessary unless where the party expressly contracts to give notice, or where it must necessarily be implied that notice is to be given, because the obligor cannot know or ascertain, from the nature of the thing, whether the act has been done or not. In *Rex v. Hollond*,¹ it was held that where a

¹ 5 T. R. 607.

public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts, as he is presumed from his situation to know them. In answer to the objection of want of notice, *Wood* says, in the argument: "Notice here merely means knowledge; and when the matter is as much in the knowledge of the defendant, or more than of any other person, the law presumes that he had knowledge;" for which he cites 16 Viner's Abr. tit. Notice, p. 5, pl. 10, where it is said, "None is bound by the law to give notice to another of that which that other person may otherwise inform himself of;" and Lord Kenyon, in giving judgment, refers to that argument, and recognizes it as showing "the true grounds upon which notice is or is not required to be averred." So here, the defendant might have informed himself whether the insurance was effected or not, and was bound to do so at his peril; and the plaintiff, not having undertaken by his contract to give the defendant notice that the assurance was effected, was not bound to do so. The defendant, by his covenant, undertakes to do nothing to vitiate an insurance effected with any person within the bills of mortality, without any stipulation whatever as to notice of the particular person with whom it should be effected. [PARKE, B. If the covenant had spoken of an insurance to be effected with A B, there would be no necessity for notice; but if it were with any person that the plaintiff may choose, then it must surely be necessary that notice should be given. Is not notice equally necessary when the covenant applies to an insurance in any one of the many public offices within the bills of mortality?] If five or six offices had been named, no notice would be necessary. If there are such a number of insurance offices in London as would render it unreasonable to expect the defendant to inquire of them all whether such an insurance had been effected, the defendant should have shown that by his plea; not having done so, the court will not assume it to be the fact. In *Doe v. Whitehead*,¹ which was an ejectment by landlord against tenant, on an alleged forfeiture by breach of a covenant to insure "in some office in or near London," it was held that the omission to insure must be proved by the plaintiff. There the same objection would have applied,

¹ 8 Ad. & Ell. 571; 3 Nev. & Per. 557.

as it would have been necessary for the landlord to make inquiry at every office in or near London. Lord Denman, C. J., says: "The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law; and the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the court cannot assist him." Here the district is limited; but if the number of offices within it are so inconvenient as to render inquiry difficult, the court cannot calculate the balance of inconvenience. Suppose all the insurance offices were in one street, no notice would surely in such case be necessary. [PARKE, B. Have you any authority for that, or in any case where there is any choice as to where the insurance shall be effected?] The cases cited in Com. Dig., before referred to, are applicable in principle; but there is no case where the party's having a choice as to the office in which an insurance is to be effected has been held to render notice necessary. In Viner's Abr. Condition (a. d.) pl. 15, it is said: "If A sells to B certain weys of barley, or other things, and B assumes to pay for every wey as much as he sells a wey for to any other man; if he after sells to others certain weys for a certain sum, he shall not have an action on the case against B, upon his promise, till he hath given him notice for how much he sold the wey to others; for B is not bound to pay it till notice, because it is uncertain and not known to him; and here he assumes in general, and not in particular, *scilicet*, to pay so much as J. S. shall pay for a wey, and so he does assume to take notice at his peril;" "but," it is added in pl. 16, "if he had assumed to pay as much for every wey as he sold a wey for to J. S., if J. S. after bought a wey for a certain sum, he ought to take notice thereof at his peril, without any notice given, otherwise he hath broken his promise." If, in the present case, the number of offices had been limited, it is quite clear that notice would not have been necessary, because the court cannot measure the inconvenience arising from a greater or less number, and the same argument will apply where the district is limited. The defendant might have remedied the inconvenience, if any inconvenience exists, by providing for it in his contract.

Peacock, in support of the demurrer. The principle established

by the cases is, that where the act is to be done by a stranger, no notice is necessary, because the fact is as much within the knowledge of the one party as the other; but where the act is to be done by the plaintiff himself, it is otherwise, and notice must be given. *Powle v. Hagger*.¹ There the court expressly drew the distinction between the case where the act is to be done by a stranger and where it is to be done by the plaintiff himself. [PARKE, B. In *Bradley v. Toder*,² and in *Fletcher v. Pynsett*,³ where the promise was in consideration that the plaintiff would marry such a woman, the defendant would give him £100, it was held that notice of the marriage was not necessary.] In *Bradley v. Toder*, the court at first held that the declaration was not good, because it was not alleged that the plaintiff gave notice of the marriage; and though the court afterwards resolved that it was good, the reason given is that it was a necessary intendment, that when, after the marriage, he requested payment of the money, notice of the marriage was given. But this is an act which lies entirely within the knowledge of the plaintiff, who effected the policy, and who alone could know the conditions annexed to it. All the cases turn upon the question whether the defendant had the means of knowledge or not; and if he had not, or not equally with the plaintiff, then notice is requisite. [Lord ABINGER, C. B. Suppose the defendant had promised to pay £1,000 to any banker in London that the plaintiff chose to open an account with, must not the plaintiff give him notice of the bank in which he has opened an account?—PARKE, B. Suppose the covenant had been that the defendant would perform the terms and conditions of any policy that the plaintiff had entered into with the Rock Life Assurance Company, he must in that case have made inquiry as to the terms upon which the policy was effected.] In *Henning's* case⁴ it is said: "If the agreement be that he shall pay so much as J. S. in particular paid, in that case *quia constat de personâ*, and he is indifferently named betwixt them, the defendant at his peril shall inquire of him, and the plaintiff is not bound to give notice; but when the person is altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice." In this case the plaintiff had the option of selecting any one of the insurance offices, and he was not con-

¹ Cro. Jac. 492.² Ib. 228.³ Ib. 102.⁴ Ib. 432.

fined with respect to the time of effecting the insurance ; and he ought, therefore, to have given notice. [PARKE, B. Suppose it had been a promise to pay the plaintiff £100 if he should go to Rome or Naples ?] There it would be his duty to give notice. When the event depends upon the performance of one of two acts which are in the plaintiff's option, he is bound to give notice, because it could only be known to the plaintiff when he had exercised his option. [PARKE, B. In *Haverley v. Loughton*,¹ the plaintiff promised J. S. that if he borrowed of one Powell £100, he would repay that sum to him upon the same day and upon the same conditions that they between them should agree upon ; and it was there held that notice was not necessary.] That case shows that where the person or the act is certain, no notice is necessary ; but when the person or the act is uncertain, and the option is to be exercised by the plaintiff, then it is necessary.

LORD ABINGER, C. B. I am of opinion that the defendant in this case is entitled to our judgment, on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having been effected, before an action can be maintained. But there is also another ground, which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality, to ascertain whether such a policy had been effected, he would still be obliged to do something more, namely, to learn what were the particular conditions on which it was effected ; because the covenant here is, not that the defendant shall not do anything to evade the covenants or conditions usually prescribed by insurance offices, but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced, *i. e.*, he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now, some conditions totally distinct from the conditions in general use might be annexed by a particular insurance office ; and in such cases it would be most unfair to

¹ 1 Bulstr. 12.

allow the plaintiff to keep the policy in his pocket, and, without notice of them, to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were, that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all; it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing, in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

PARKE, B. My mind is not entirely free from doubt; but I am inclined, on the whole, to agree with the Lord Chief Baron. The defendant here is sued on a covenant, by which he stipulates to do two things: namely, to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that this is confined to an insurance to be effected at the particular office at which he should appear; the words "such insurance," in this covenant, meaning simply an insurance on his life. The defendant is bound in the first instance to appear at an insurance office; and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the stipulations which have been entered into by the policy. The question then is, whether an action can be maintained on this covenant, when notice of the effecting such insurance, or of its terms, is not averred in the declaration. The general rule is, that a party is not entitled to notice, unless he has stipulated for it; but there

are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite; as in the case of *Haule v. Hemyng*,¹ where a man promised to pay for certain weys of barley as much as he sold them for to any other man. There the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases; and in such cases, the right of the defendant to a notice before he can be called on to pay, is implied by law from the construction of the contract. So, where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them; for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B, or perhaps on the marriage of B alone, (for there are some cases to that effect,) or to pay such a sum to a certain person, or at such a rate as A shall pay to B. In these cases, there is a particular individual specified, and no option is to be exercised; and the party who, without stipulating for notice, has entered into the obligation to do those acts, is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at *some office* in London. Now, my present impression is, that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given; and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option, as to which he had selected. But this principle holds even more strongly in the present case; for not only do the terms of the covenant apply to

¹ Viner's Abr. Condition, (A. d.) pl. 15; Cro. Jac. 422.

all actually existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now this is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice ; and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office ; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, &c., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature, that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given. There is, it is true, notice of an intention to effect a policy, but none either of its having been made at all, or made with any particular conditions. Possibly, if it had been notified generally to the defendant that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature, and the conditions with which it was coupled ; but I think that he was, at least, entitled to notice of the fact of its existence.

ALDERSON, B. I am of the same opinion ; and my judgment is founded on the authority of *Haule v. Hemming*, as reported in Viner's Abr. Condition, (A. d.) pl. 15. In this case the defendant covenants that he will not do any act, deed, or thing, whereby any such insurance may be avoided or prejudiced. The insurance is to be effected at any time or times, or at any office or offices, within certain limits, and is not confined to the then existing offices. The plaintiff has the selection from an indefinite number ; and it seems to me, that the person who is to select the office must give notice of his having done so. If the defendant had received notice that an insurance was effected in the Rock Life Insurance Company, I by no means say that he would not be bound to inform himself of any conditions to which it might be subject.

 Burridge v. Row.

ROLFE, B. I am of the same opinion. I own that when the case was first opened, my impression was in favor of the plaintiff; and for this reason, that when a party enters into a contract, he is bound to perform it, whether reasonable or not. Where the law casts an obligation upon him, it says that it shall be reasonable; but that is not so where a party contracts to do a particular act; for then it is his own fault for entering into such a contract. In the progress of the argument, my opinion changed; and I think that the plaintiff was bound to give notice. I find it stated in Viner's Abr. Condition, (A. d.) pl. 10: "If I am bound to enfeoff such persons as the obligee shall name, he ought to give notice of those he names, otherwise I am not bound to enfeoff them;" and reason seems to be in favor of this principle of law. The question is, what is the meaning of the contract, where a party covenants to do something at the option of another? It must mean, provided he have notice of that option having been exercised.

Judgment for the defendant.

IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer.*)

VYSE vs. WAKEFIELD.

A writ of error having been brought on the judgment of the court of exchequer in this case,¹ it now came on for argument. The court, however, on reading the record, were unanimously of opinion, that an averment of notice to the defendant that the policy had been effected was necessary to make the declaration good, and that the judgment must be affirmed.

Judgment affirmed.

BURRIDGE vs. ROW.

(1 Younge & C. Ch. 183. Coram Bruce, V. C. 1842.)

Marriage settlement. Payment of premiums by wife. Lien. — By a settlement, executed upon the marriage of A with B, the daughter of W., trusts were declared of two several sums of £5,000, whereof one was secured by the bond of W., and the other by the covenant of A, and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payment of the latter sum, A assigned to the trustees certain policies of assurance, which he had effected on his own life, to the value of the principal money comprised in his covenant. The trusts declared of the former sum were for B for life, for her separate use, and after her death for A for life, and after the death of both, and in default of children of the marriage, for the benefit of B's estate. The trusts of the latter sum were for B for life, and after her death, failing children of the marriage, for the executors, administra-

¹ *Supra.*

Burridge v. Row.

tors, and assigns of A. After the marriage A became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividends received under that proof in the purchase of £431 consols. At the same time W. purchased of A's assignees all A's interest in the settlement, and took from them an assignment of that interest. A afterwards died: whereupon the trustees received the produce of the policies, and invested it in £5,992 consols. Ultimately, W. became bankrupt, and died: *Held*, that notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and assignment from A's assignees, the assignees of W. could take no interest in the £5,992 stock, without first satisfying the trustees of the settlement what was due to them in respect of W.'s bond for £5,000; and *quære*, whether, notwithstanding the assignment to W. of A's interest under the settlement, A's assignees had not a right to recall the dividend which produced the £431 consols?

Feme covert, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as collateral security for a provision settled upon her under that instrument by the covenant of her husband. *Held*, that, upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid.

The voluntary payment of premiums on a policy of assurance confers on the payer no interest in the policy.

By an indenture of settlement, bearing date the 16th November, 1825, made between Alderman Winchester and Sarah, his daughter, of the first part, William Row the younger, of the second part, and Skinner Row and Thomas Briggs, of the third part, reciting that a marriage was intended to be had between the said William Row and Sarah Winchester, and that, on the treaty for the same, Alderman Winchester had agreed to execute, and had since executed, to the said Skinner Row and Thomas Briggs a bond for securing to them, in case the marriage should take effect, payment of the sum of £5,000 within six calendar months next after his, Alderman Winchester's, decease, with interest from the time of the marriage; and reciting that William Row had agreed, in case the marriage should take effect, to secure to the said Skinner Row and Thomas Briggs, their executors, administrators, or assigns, payment of a sum of £5,000 within six calendar months next after the decease of him the said William Row, and to assign the several policies of insurance thereafter mentioned, and the moneys thereby secured, or to accrue thereon, upon the trusts thereafter expressed: it was witnessed and declared, that in case the said sum of £5,000, so secured by the said bond of the said Alderman Winchester, should become payable, then the said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, should lay out and invest the same in their or his names or name, in or upon real or govern-

ment securities, and stand possessed thereof, and of the interest in the mean time growing due thereon, upon trust, after the solemnization of the said intended marriage, to permit, authorize, and empower the said Sarah Winchester, and her assigns during her life, to receive and take the yearly dividends, interest, and annual proceeds thereof, to and for her and their own use, and not subject to the control, debts, or engagements of the said William Row; and after her decease, upon trust, to permit and authorize the said William Row, and his assigns, to receive the dividends and interest of the said fund during his life; and after the decease of the survivor of them, the said Sarah Winchester and William Row, upon certain trusts, for the benefit of the children (if any) of the marriage, and in default of children, for the executors or next of kin (according to circumstances) of Sarah Winchester. And by the same indenture, William Row, for himself, his heirs, executors, and administrators, covenanted with the said trustees, their heirs, executors, and administrators that, in case the said intended marriage should take effect, his heirs, executors, or administrators would, within the space of six calendar months after his decease, pay or cause to be paid to the said trustees, or the survivor of them, or the executors or administrators of such survivor, the sum of £5,000 sterling, upon the trusts thereafter expressed and declared concerning the same; and after reciting that William Row had effected two policies of assurance on his life for £3,000 and £2,000, and describing those policies; and reciting that it had been agreed that those policies, and all bonuses and accumulations thereon, should be assigned to the said trustees as a fund or security in aid of the covenant thereinbefore contained for payment of the said sum of £5,000, thereby covenanted to be paid, and all and every other sum or sums which they the said trustees, or the survivor of them, might pay to keep the same policies on foot, as thereafter mentioned: it was thereby further witnessed that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said William Row did bargain, sell, assign, transfer, and set over unto the said trustees, their executors and administrators, the said two several instruments or policies of insurance thereinbefore mentioned, and the said two sums of £3,000 and £2,000 thereby secured, and all bonuses or accumulations in respect thereof, to have, hold, receive, take, and enjoy the same, unto the said trustees, their executors and admin-

istrators, in trust, in case the said intended marriage should take effect, as soon as conveniently could be after the decease of the said William Row, to call in and receive the said several sums of £3,000 and £2,000, and every other sum of money payable by virtue of the same policies of insurance, and out of the moneys so to be received to pay, satisfy, and retain the said sum of £5,000 thereinbefore covenanted to be paid by the said William Row, or so much thereof as should not have been previously paid by his heirs, executors, or administrators, pursuant to the same covenant; and also should invest the said sum of £5,000, and such further or other sums, in the names of the trustees, in the parliamentary stocks or public funds, or at interest upon government or real securities, and stand possessed of and interested therein upon the following trusts: that is to say, upon trust to permit or authorize and empower the said Sarah Winchester, and her assigns during her life, to receive and take the interest, dividends, and annual produce of the said sum of £5,000, and all and every other sum or sums that should or might be received under or by virtue of the said two policies of insurance, and of the stocks, funds, or securities, in or upon which the same should be invested, in the same manner as was thereinbefore declared respecting the dividends and annual produce of the said sum of £5,000 secured to be payable on the decease of the said Alderman Winchester; and after the decease of the said Sarah Winchester, upon certain trusts for the benefit of the children of the marriage; and in default of children, in trust for the said W. Row, his executors, administrators, and assigns.

The settlement contained a covenant on the part of Row to keep the policies on foot; and it was provided, that in case Row should at any time thereafter neglect or refuse to pay the annual premiums, it should be lawful for, but not compulsory upon the trustees, at the request in writing of Row and his wife, to pay the annual premiums out of the interest of the £5,000, payable on the decease of Alderman Winchester, or to mortgage, charge, or sell the policies, and stand possessed of the produce upon the same trusts as were declared of the £5,000 thereby secured.

The marriage took effect soon after the date of the settlement.

On the 9th of October, 1828, a commission of bankrupt issued against W. Row, when, in pursuance of an order obtained on the petition of the trustees, the covenant of Row to pay the £5,000

was valued at £1,625, and the trustees proved for the same accordingly. Dividends were afterwards received on this proof, which were invested in the purchase of £431 19s. 9d. consols, in the name of the trustees.

Row paid the premiums due on the policies of assurance until his bankruptcy. For some years after that period they were paid by Alderman Winchester, who retained the amount out of the interest payable from him to his daughter on the £5,000 bond, and ultimately they were paid by the daughter herself.

By an indenture of assignment, bearing date the 5th of January, 1832, and made between the assignees of Row, of the one part, and Alderman Winchester, of the other part, reciting the beforementioned facts, and that Alderman Winchester had contracted with the said assignees for the absolute sale to him of all the said bankrupt's interest, reversion, and expectancy of and in the said sums of £5,000 and £5,000 under and by virtue of the said indenture of settlement, and all benefit and advantage thereof, at the price of £100: it was witnessed, that in pursuance of the said agreement, and in consideration of the sum of £100, &c., the said assignees bargained, sold, assigned, transferred, and set over to the said Alderman Winchester, his executors, administrators, and assigns, all the reversion, interest, and expectancy of the said bankrupt of and in the interest of the first mentioned sum of £5,000, so secured by the bond of the said Henry Winchester, as therein was mentioned, and which the said William Row would have been entitled to receive during his natural life in the event of his surviving his wife; and also of and in the said secondly mentioned sum of £5,000 so secured to be paid to the trustees under the said therein recited indenture by the heirs, executors, and administrators of the said bankrupt within six calendar months next after his decease, by virtue of the said settlement, and which had been so valued, and on which the said dividend had been so received and invested as therein mentioned; and all his right, title, and interest of and to the same, and every part thereof, and all accumulations thereon; to have, hold, receive, and take the said reversion, interest, and expectancy of and in the said several sums of money and premises thereinbefore assigned or intended so to be, unto the said Winchester, his executors, administrators, and assigns, to and for his and their own use and benefit, and as and for his and their own proper moneys and effects, in as full,

ample, and beneficial a manner as he the said William Row, his executors, administrators, or assigns, by virtue of the said indenture of settlement, might have held the same in case he had not become a bankrupt.

Shortly after the execution of this assignment, namely, in March, 1832, William Row died, leaving no issue. His widow in the following month married John Burridge, and soon afterwards went with her husband to the East Indies.

No settlement was made upon this marriage.

Upon the death of William Row, the trustees, Skinner Row and Thomas Briggs, received the two sums of £3,000 and £2,000 secured by the policies of assurance, and also a further sum of £279 as a bonus thereon, and they, with the privity of Alderman Winchester, invested these sums in the purchase of a sum of £5,992 17s. 4d., £3 per cent. consolidated bank annuities, in their the trustees' joint names.

The dividends on this last mentioned stock, and also on the £431 19s. 9d. consols, were regularly paid by Briggs, the acting trustee under Row's marriage settlement, to Mr. and Mrs. Burridge until the year 1835, from which time the dividends were allowed to accumulate.

On the 17th of February, 1838, a fiat in bankruptcy issued against Alderman Winchester, under which he was declared a bankrupt. In the following month Alderman Winchester died; and in July Mr. and Mrs. Burridge returned from India and claimed to have a transfer to them of the £5,992 17s. 4d. stock, and the payment of the dividends remaining in the hands of Briggs. This was refused on the ground that Briggs, who was solicitor under the fiat against Winchester, and also Winchester's private solicitor, had received notice from Winchester's assignees not to make such transfer or payment.

The present bill was filed by Mr. and Mrs. Burridge against the trustees of Row's marriage settlement and the assignees of Winchester, charging that the assignees claimed the produce of the policies on the ground that Row's covenant for payment of £5,000 had been satisfied by the proof made by the trustees against Row's estate under his bankruptcy, and praying a declaration that the plaintiffs were entitled either to an absolute interest or an interest for the life of John Burridge, in the sum of £431 19s. 9d. consols, and also in the sum of £5,992 17s. 4d. consols,

the produce of the policies, and might be paid the dividends on the latter sum due since 1835, and might be repaid the amount of premiums paid by Mrs. Burridge on the policy from the time of Row's bankruptcy until her death.

The hearing of the cause having commenced, the VICE-CHANCELLOR observed that Row's assignees were not before the court; and, although they had executed an assignment to Winchester of the bankrupt's interest in the trust funds, that might not include every interest which they as assignees might have in the questions before the court. No further observation, however, was made on that subject in the course of this day's argument.

Mr. *Simpkinson*, Mr. *Russell* & Mr. *Wetherell*, for the plaintiffs. First, the sum of £431 19s. 9d. represents the corpus of the £5,000 which Row covenanted to pay. The plaintiffs, therefore, are entitled to the dividends of that sum for the life of Mrs. Burridge.

Secondly, the plaintiffs have a right to have the sum of £5,992 17s. 4d. consols applied by the trustees in satisfaction of the bond of Alderman Winchester. It is alleged, on the other side, that Row's covenant being satisfied by payment of the £431 19s. 9d., the plaintiffs have no further claim on the policy fund; and, therefore, that the whole of that fund belongs to the parties who represent Row's interest; that is to say, the assignees of Winchester. But how can Winchester's assignees call on the trustees of this fund to pay it over to them, without first satisfying the trustees the amount of Winchester's bond? It is true that Winchester acquired his interest in the policy fund by an act subsequent to the settlement, and not under the settlement itself; but the principles of *Priddy v. Rose*,¹ *Woodyatt v. Gresley*,² and *Smith v. Smith*,³ will, nevertheless, govern this case. It is a case of mutual credit. *Jeffs v. Wood*,⁴ *Rankin v. Barnard*,⁵ *Crosbie v. Free*.⁶ Besides, the policies are not made mere securities, but are the subject of the settlement. We say we are entitled to interest on the policy fund; but, whether we are or not, we are entitled to have the produce applied in satisfaction of the bond and interest, and of the sums which we have paid for premiums. The personal covenant of the husband was only a collateral guar-

¹ 3 Mer. 86.² 8 Sim. 180.³ 1 Y. & C. 338.⁴ 2 P. W. 128.⁵ 5 Madd. 32.⁶ Craig & Ph. 64.

Burridge v. Row.

antee that the sum should at least be £5,000. [The VICE-CHANCELLOR. In *Smith v. Smith* it was held that the trustees might retain the dividends to make good the debt. That is different from selling the whole interest.] The circumstance of the interest being reversionary ought not to make a difference.

Mr. *Rogers*, Mr. *Briggs* & Mr. *Bourdillon*, for the trustees.

Mr. *Cooper* & Mr. *Walford*, for the assignees of Winchester. When the policies were assigned to the trustees no notice was given at the offices, and, therefore, on the bankruptcy of Row the policies were in his order and disposition. [The VICE-CHANCELLOR. You do not make that case by your answer. Besides, is it certain that that doctrine applies to the case of policy holders who are partners with the assurers?] At all events, on the proof being made under Row's bankruptcy, the policy fund was withdrawn from the settlement and became vested in Row's assignees, and afterwards in Winchester. But to what extent was that fund ever subject to the trusts of the settlement? Only so far as it was properly dealt with by the trustees. No dealings with the premiums by Alderman Winchester or his daughter would subject that fund to the trusts. The trustees, in certain events, had a right to pay the premiums or sell the policies; but here no authority for that purpose was ever given, pursuant to the terms of the settlement. Suppose, then, the policies, under such circumstances, had been sold to a stranger, could it have been contended that they were liable to the trusts of the settlement? If not, the accidental circumstance of their being sold to Alderman Winchester can make no difference. In the cases which have been cited, the claims which were set off against each other arose out of the same settlement, which is not the case here. The mere circumstance, it is submitted, of Winchester's paying the premiums would entitle him to the fund. Upon the bankruptcy of Row there were no funds to keep up the premiums, and the trusts were at an end. Subject to any arrangement between himself and his daughter, it was a clear and distinct purchase by Alderman Winchester.

The VICE-CHANCELLOR. From whatever motive Alderman Winchester paid these premiums, if they were not paid by means of any contract with the trustees, or with Mr. Burridge or his wife, the consequence of these payments would not be the acquisition of the property in the policies by Alderman Winchester.

Nothing that has been stated to me has had the effect of persuading me that, without any contract for that purpose, the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property. I am not aware that there is any authority or principle in support of any such proposition. I must, therefore, hold that Mrs. Burridge's life interest in the policy fund exists in her, not affected in any way by what has been done, except to this extent: that if there be any dispute whether or not Alderman Winchester was repaid the amount of the premiums by means of the detention of the income which he was liable to pay to Mrs. Burridge, there must be an inquiry on that point. [It was here stated at the bar that he was repaid.] Then that fact must appear on the decree.

It then remains to consider the title of Mrs. Burridge to compensation, or indemnity, in respect of the payments which she has made, and which her husband's estate was liable to make. It is, as I understand, proved in the cause that Mrs. Burridge, out of her income, or by means of deductions out of her income, has actually paid the premiums, to a certain extent, on the policies which his estate was liable to pay. I must, therefore, declare that the plaintiff, Mr. Burridge, in right of his wife, has, in respect of the sums charged against her for these premiums, a lien upon Row's interest under the settlement, whether it has been assigned or not to Alderman Winchester. Whether those sums would carry interest, may be a question. If I were to decide the question now, I should decide that these premiums bear simple interest at £4 per cent. [The defendant's counsel said they would not press this point.]

Then there is another question, (treating it as unaffected by anything which has taken place in Winchester's bankruptcy,) namely, the question of set-off. Having regard to the rights and liabilities of the parties immediately before the bankruptcy of Winchester, I think there is a right on the part of the plaintiffs to say that the interest belonging to Row's estate, which Mr. Winchester had purchased, shall not be taken from them without making good Winchester's obligations, although the liability does not stand exactly on the same footing as in the three cases of *Priddy v. Rose*, *Woodyatt v. Gresley*, and *Smith v. Smith*. I view the policy fund as standing rightly in the names of the trus-

tees now before the court. If Winchester had not become bankrupt, and after his death his executors had applied to the trustees for a transfer of the policy fund and interest on the policies, the trustees would have a right to say: "True, we owe you this, but you owe us a sum on your bond; therefore, let an account be stated between us." If that were the state of the rights of the parties at that time, the bankruptcy of Winchester would make no difference; but, according to the extensive meaning which has been applied by the authorities to that expression, there was a mutual credit between the parties. There was a right of retainer, set-off, or lien, — call it what you will, — in favor of the plaintiffs against Winchester's estate. I am not, however, prepared to say that I can give effect to that lien now; but it may be convenient that I should declare it, for then the effect of it may be obtained in Mrs. Burridge's lifetime; inasmuch as the assignees of Mr. Winchester might think fit to sell the reversionary interest in the policies; and if they take that course, they must do so subject to that right, which I think I am justified in now declaring to be in the plaintiffs.

On a subsequent day, on the case being again mentioned, the VICE-CHANCELLOR repeated the doubt which he had before expressed, as to the effect of the deed of assignment on the rights of Row's assignees; his honor being of opinion that it was a question whether, notwithstanding that instrument, those assignees might not have a right to call back the £431 stock; and he desired that the point should be argued on a future day.

The question was accordingly argued; and, in the course of the argument, the cases of *Ex parte Downes*,¹ *Ex parte Eggington*,² and *Ex parte Solomon*,³ were cited.

The VICE-CHANCELLOR. I continue of opinion that the question, what ought to be done with the fund consisting of £431 19s. 9d. consols is a question of considerable difficulty, under the peculiar circumstances of the case. That difficulty is, however, more with respect to the title of the assignees of Row, than with respect to that of the assignees of Winchester. It occurred to me at one time, in the course of the argument, not, certainly, to give the fund to the assignees of Winchester, but so far to deal with it as liable to an adverse, outstanding claim, as now to dis-

¹ 18 Ves. 290.² Mont. 72.³ 1 G. & J. 25.

pose of it without prejudice to any claim to be made upon it in favor of the real objects of the trust, leaving those absent parties to apply, if they might be so advised. Having, however, frequently reconsidered this subject since the day on which it was last before the court, I have come to the conclusion that the more safe course will be to keep back that fund for the present, and to give the assignees of Row liberty to apply, if they think fit. As I understand it, the fund representing the dividends has been accumulating since it was brought into court; and, of course, that amount of stock has been varying every half year, and the two sums have been kept distinct. I think, therefore, that I shall better consult what is due to substantial justice, by not letting Mrs. Burridge, as I was originally disposed to do, receive the income of this fund, but by retaining it, and carrying it over to a separate account; the accumulations to be continued and carried over, without prejudice to any question, with liberty to the assignees of Row, or any other person, to apply respecting that fund as they may be advised.

If the assignees of Row think fit to come to this court in this cause upon a petition, either as respondents or as petitioners, I shall be ready to hear and dispose of that case. I neither encourage nor discourage any such claim. I only see enough to convince me that there is reasonable subject for discussion, and that that discussion may involve their interests. Should they think fit to discuss the question in this or in any other suit, there will be two points to consider: first, whether either they or the assignees of Winchester are entitled to anything, — whether either of them can displace Mrs. Burridge's title; then, whether, according to the true construction of that deed, they, or the assignees of Winchester, are entitled; a question into which I cannot effectually enter, in the absence of the assignees of Row.

The reason of the doubt in this case is obvious, namely, that whereas, according to the intention of the settlement, if the policies produce the full sum of £5,000, there can be no claim against the estate of Row; yet, in fact, there has been a claim against the estate of Row, without any deduction or variation in respect of these policies, and these policies have since produced the full amount. That is the difficulty I have felt from the beginning of this case, and from which my mind is not yet relieved; and, therefore, I think I shall be much more likely to do justice to all parties by reserving that fund for the present.

PARSONS *vs.* BIGNOLD.

(13 Sim. 518. Coram Shadwell, V. C. 1843.)

Reform of policy.—An erroneous statement was made to a life insurance company, by or through their agent, as to A's interest in his son's life, upon which the company granted a policy to A. After the son's death the company discovered the error and refused to pay the sum insured. A bill filed by A to have the mistake rectified was dismissed, because the evidence did not show distinctly whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A.

THE plaintiff held certain copyhold and leasehold tenements, at Winscombe, in Somersetshire, under the Dean and Chapter of Wells, for the lives of his son, James Parsons, and another person, and certain leasehold tenements, at Puxton, in the same county, for different lives, under Lord Wyndham; and being desirous of insuring the life of his son James for £1,000, he went to the office of the Norwich Union Life Insurance Society, at Axbridge; and, after some conversation relating to the proposed insurance had taken place between him and one Norvill, the agent for the society at that place, the latter inserted, in a printed form, the age of James Parsons, and all the other particulars required by the society to be declared by persons desirous of effecting insurances in their office, except the nature of the plaintiff's interest in his son's life, which the agent added after the plaintiff had signed the declaration and quitted his office. The declaration was transmitted to the society in London, and a policy, dated the 17th of August, 1840, was thereupon granted.

In April, 1841, James Parsons died; and the insurance society having refused to pay the £1,000, the plaintiff brought an action for it against Bignold, their secretary; to which Bignold pleaded that the nature of the plaintiff's interest in his son's life was not correctly set forth in the declaration made by him on effecting the policy. And it appeared from a copy of that document which the plaintiff afterwards obtained, that the plaintiff was therein stated to be interested in his son's life, in respect of a leasehold estate held under the Dean and Chapter of Wells, and of another leasehold estate at Puxton, held under Lord Wyndham.

The bill alleged that the statement relative to the estate at Puxton was a mistake on the part of Norvill, and was inserted by him without the plaintiff's authority, knowledge, or privity, and in his absence and after he had signed the declaration; that the plaintiff never stated to Norvill that he had any interest,

dependent on his son's life, in any property at Puxton ; but, on the contrary, told Norvill that his son's life was not in the property at Puxton. The bill prayed that the mistake might be rectified, or that Bignold might be restrained from availing himself of it by way of defence to the action.

Bignold, in his answer, said that the declaration contained a false and fraudulent representation as to the state of James Parsons's health, and, therefore, the policy was void ; and that he believed that the statement in the declaration relative to the plaintiff's interest was made, not without the plaintiff's knowledge or privity, but by his direction and at his dictation. He admitted, however, that he had received a letter from Norvill, stating that he filled up the declaration after the plaintiff had signed it ; that he should not have known that the plaintiff had property at Puxton unless the plaintiff had told him so, but he could not undertake to swear that the plaintiff told him that his [interest in his] son's life was in that property, and that the entry to that effect must certainly be an error on his part. The defendant added that he did not admit or believe the statements in the letter to be true, and that if Norvill did fill up the declaration as stated in the bill, he did so as the agent, not of the insurance society, but of the plaintiff.

The substance of Norvill's evidence in chief was that the plaintiff must have mentioned to him the property at Puxton, otherwise he should not have entered it in the declaration, for he should not have known that the plaintiff had property there ; that he filled up the declaration, about an hour after the plaintiff had signed it, from his recollection of the plaintiff's statements ; but could not depose, with certainty, whether they were correctly represented therein. On cross-examination, he said that he could not swear whether or not the plaintiff told him that his son's life was in the Puxton property.

Mr. *Bethell* & Mr. *Prior*, for the plaintiff, said that Norvill acted improperly in filling up the declaration after the plaintiff had signed it, and it was quite plain that he had made the mistake ; but that if it had been made by the plaintiff himself, the court would have relieved against it. *Ball v. Storie*,¹ where the court reformed an instrument at the instance of the party who drew it.

¹ 1 Sim. & Stu. 210.

Mr. *Anderson* & Mr. *Bacon* appeared for the defendant; but

The VICE CHANCELLOR, without hearing them, said:—

In the case referred to, the real intention of the parties appeared from a written instrument; and the object of the suit was to give effect to their intention as it so appeared. But in this case, *non constat* but that the plaintiff may have made a statement to Norvill, which fully warranted him to make the representation which he did in the declaration. The evidence does not go far enough. It does not show clearly, as it ought to have done, what it was that the plaintiff told Norvill relative to his interest in his son's life. In order to induce the court to give relief, the evidence ought to have shown that the entry made by Norvill in the declaration did not correspond with the statement made to him by the plaintiff.

After the policy has been granted on the footing of the statements contained in the declaration, I do not see how this court can interfere; and, therefore, the bill must be dismissed.

Note.—This case clearly proceeds upon the ground of misrepresentation, and not upon the necessity of a pecuniary interest in the son's life; for such an interest the plaintiff had at all events in the estates at *Winscombe*.

DOWNES & another vs. WILLIAM GREEN.

(12 Mees. & W. 481. Exchequer, 1844.)

Usury.—Debt on a bond given by the defendant to the plaintiffs in the penal sum of £700, conditioned for payment of £350, with interest at £5 per cent. per annum, by certain instalments, and also for payment, during such time as the £350 and interest, or any part thereof, remained unpaid of the annual premium of £26 2s. 8d., payable on a policy of assurance on life for £800, deposited as a collateral security for the repayment of the £350 and interest and all costs to be incurred in enforcing performance of the bond; with a proviso that the moneys to be ultimately recoverable on the bond should not exceed £500. Breach, nonpayment of the £350. Plea, setting out the condition of the bond on oyer, and alleging that, at the time of making it, it was corruptly agreed between the plaintiffs and the defendant that the plaintiffs should lend the defendant £350, to be repaid by instalments, with £5 per cent. interest, being the moneys of a life insurance company, of which the plaintiffs were members, and that the defendant should insure his life with that company for £800, at an annual premium of £26 2s. 8d., (the same being a larger sum than was necessary to secure the repayment of the £350,) and should deposit the policy with the plaintiffs as collateral security for the repayment of the £350 and interest. The plea then averred that, in pursuance and part performance of such corrupt contract, the defendant effected the policy of insurance for £800, for the benefit of the insurance company, executed the bond in question, and deposited the pol-

Downes v. Green.

icy with the plaintiffs as a collateral security; and that the interest on the £350, together with the premium payable on the policy, exceeded the rate of £5 for the forbearing of £100 for a year, against the form of the statute, whereby the bond was void. *Held*, that the contract stated in the plea was not usurious, and that the plea was bad in substance.

DEBT on a joint and several bond given by the defendant and Mary Green, as sureties for one Frederick Green, to the plaintiffs and two other persons since deceased, of the names of Shaw and Balmanno, in the penal sum of £700, conditioned for the payment by the defendant of £350, with interest thereon at £5 per cent. per annum, by certain instalments, and also for the payment, during such time as the said sum of £350 and interest, or any part thereof, should remain unpaid, of the annual premium of £26 2s. 8d., payable on a policy of assurance for £800, deposited as a collateral security for the repayment of the £350 and interest, and of all costs and expenses which should be incurred in enforcing performance of the bond; with a proviso that the moneys intended to be ultimately recoverable thereon should not exceed £500. Breach, nonpayment of the principal sum of £350.

The plea set out the condition of the bond on oyer as follows: "Whereas the said Frederick Green, having occasion for the sum of £350, hath applied to the said John Shaw, Charles Downes, Alexander Balmanno, and Edward Boyd, to lend him the same, which they have agreed to do, upon the said Frederick Green, together with the said William Green and Mary Green, as his sureties, entering into this present bond or obligation in the above mentioned penalty for securing the due payment of the said principal sum of £350 and interest thereon as hereinafter mentioned, and also the payment of the annual premium and premiums which shall become due on a certain policy of insurance on the life of him, the said Frederick Green, under the hands of three of the directors of the United Kingdom Life Assurance Company, in the sum of £800, being No. 153, and dated the 3d day of July instant, as hereinafter mentioned, and upon the said Frederick Green depositing with the said John Shaw, Charles Downes, Alexander Balmanno, and Edward Boyd the said policy of assurance as a collateral security for the repayment of the said sum of £350 and interest, and all costs, charges, and expenses which the said John Shaw, Charles Downes, Alexander Balmanno, and Edward Boyd, or any of them, their or any of their executors, administrators, or assigns, may from time to time incur or expend

in enforcing the performance of this present bond or obligation : Now, therefore, the condition of the above written obligation is such, that if the above bounden Frederick Green, his heirs, executors, or administrators shall and do well and truly pay or cause to be paid to the said John Shaw, Charles Downes, Alexander Balmanno, and Edward Boyd the said sum of £350 of lawful money of Great Britain, together with interest, half yearly, for the same at the rate of £5 for £100 by the year, by instalments, in manner following ; that is to say, the sum of £50, part of the said principal money, to be paid yearly, on the 10th day of July in every year, with interest, at the rate aforesaid, on the said sum of £350 or such part thereof as shall, at the respective times of payment of the said interest, remain unpaid on the 10th day of July and on the 10th day of January in every year, until the whole of the said sum of £350 and interest shall be fully paid and satisfied ; the first payment thereof to be made on the 10th day of July, in the year 1836, without any deduction or abatement whatsoever ; and also shall and do pay or cause to be paid yearly and every year during such time as the said principal sum of £350, or any part thereof, or the interest of the said principal sum, or any part thereof, shall remain unpaid, the annual premium and premiums of £26 2s. 8d., payable on the said policy of assurance, for keeping the same on foot, as and when the same shall become due and payable, then this obligation to be void and of none effect. But if default shall be made in any part of the condition above written, then the same to be and remain in full force and virtue ; provided always, that the moneys intended to be ultimately recoverable under the present obligation shall not exceed the sum of £500 : ” which, being heard and read, the defendant says that, before and at the time of the making of the said supposed writing obligatory in the declaration mentioned, and in the lifetime of the said Shaw and Balmanno, since deceased, each and every one of them, the said Shaw and Balmanno and the plaintiffs, was a member of a certain life assurance company, to wit, the United Kingdom Assurance Company. And the defendant in fact further saith that, before the making of the said supposed writing obligatory, and in the lifetime of the said Shaw and Balmanno, since deceased, to wit, on, &c., it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said Frederick Green and the

said Shaw and Balmanno and the plaintiffs, that they, the said Shaw and Balmanno and the plaintiffs, should lend and advance to the said Frederick Green a certain sum of money, to wit, the sum of £350; (the same then being the proper moneys of the said United Kingdom Life Assurance Company, whereof each and every of them, the said Shaw and Balmanno and the plaintiffs, then was a member;) and that they, the said Shaw and Balmanno and the plaintiffs, should forbear and give days of payment of the said sum of £350, and interest thereon, from the time of lending and advancing the same, in manner and until and upon certain other times following, to wit, the said sum of £350 to be paid by instalments of £50 yearly, on the 10th day of July in every year, until the whole should be fully paid; the first payment thereof to be made on the 10th day of July in the year 1836 aforesaid, and the interest on the said sum of £350, or such part thereof as should, at the respective times of payment of the said interest remain unpaid, at the rate of £5 for £100 by the year, to be paid half-yearly, by instalments, on the 10th day of July and on the 10th day of January in every year, until the whole of the said sum of £350 and interest should be fully paid,—the first payment thereof to be made on the said 10th day of July in the year 1836 aforesaid; and that the said Frederick Green should effect a policy of assurance on the life of him, the said Frederick Green, in the United Kingdom Life Assurance Company, whereof each and every of them, the said Shaw and Balmanno and the plaintiffs, then was a member as aforesaid, in a certain other sum of money, to wit, the sum of £800, at a certain annual premium of £26 2s. 8d. to be payable thereon, for the benefit of the said United Kingdom Life Assurance Company, whereof each and every of them, the said Shaw and Balmanno and the plaintiffs, then was a member as aforesaid, for keeping the same on foot, the said sum of £800 then being a much greater sum, to wit, a sum greater by and in the amount of £200, than was necessary for securing to the said Shaw and Balmanno and the plaintiffs, to wit, as trustees for themselves and other members of the said United Kingdom Life Assurance Company as hereinafter mentioned, the sum of £350 and interest thereon, as aforesaid, and all costs, charges, and expenses to be by them reasonably incurred or expended in enforcing the performance of the bond or obligation by the said agreement stipulated for as hereinafter mentioned,

such policy to be under the hands of three of the directors of the said United Kingdom Life Assurance Company; and should deposit the said policy of assurance so to be effected as aforesaid with the said Shaw and Balmano and the plaintiffs, as a collateral security for the repayment of the said sum of £350 and interest, and all costs, charges, and expenses which the said Shaw and Balmano and the plaintiffs, or any of them, their or any of their executors, administrators, or assigns, might from time to time incur or expend in enforcing the performance of the said bond or obligation by the said agreement stipulated for as hereinafter mentioned; and that the said F. Green, together with the defendant and one Mary Green as his sureties, should enter into a certain bond or obligation, under their seals, to the said Shaw and Balmano and the plaintiffs, to wit, as trustees for themselves and the other members of the said United Kingdom Life Assurance Company, in a certain penalty, to wit, of £700, (the said bond or obligation being subject to a proviso limiting the money to be ultimately recoverable thereupon not to exceed £500,) for securing the due payment by the said F. Green of the said principal sum of £350 and interest thereon as aforesaid, and also the payment by the said F. Green, yearly and every year, of the annual premium and premiums of £26 2s. 8d. payable and which should, during such time as the said principal sum of £350, or any part thereof, or the interest of the said principal sum, or any part thereof, remain unpaid, become due on the said policy of assurance so to be effected on the life of him, the said F. Green, in the said sum of £800, (the same then being so greater as aforesaid,) for keeping the same on foot, as and when the same should become due and payable. [The plea then averred the effecting by F. Green of the policy of assurance for £800, dated the 3d of July, 1834, the payment by him of the first annual premium of £26 2s. 8d. thereon, the execution of the bond by him as principal, and by the defendant and Mary Green as his sureties, and the depositing of the policy with Shaw and Balmano and the plaintiffs as a collateral security for the repayment of the £350 and interest, &c.] And the defendant in fact further saith, that the said Shaw and Balmano and the plaintiffs, in further pursuance of the said corrupt and unlawful agreement, did afterwards, to wit, on, &c., lend and advance to the said F. Green the said sum of £350, (the same then being the proper moneys of

the said United Kingdom Life Assurance Company, whereof each and every of them, the said Shaw and Balmano and the plaintiffs, was then a member as aforesaid,) to be so forborne and given days of payment for, with interest thereon as aforesaid; and the defendant in fact further saith, that the only object of the said F. Green in agreeing as aforesaid and in effecting and depositing the said policy of assurance so effected by him in the said sum of £800, (so being greater as aforesaid,) was the obtaining of the said loan and advance of the said sum of £350, as the said Shaw and Balmano and the plaintiffs at the several times of the said agreement and of effecting and depositing the said policy as aforesaid well knew, and that but for his so agreeing and so effecting and depositing the said policy, the said Shaw and Balmano and the plaintiffs would not have lent or advanced the said sum of £350; and the defendant further saith, that the said interest on the said sum of £350, or such part thereof as should at the respective times of payment of the said interest remain unpaid, at the rate aforesaid, so agreed to be paid by the said F. Green to the said Shaw and Balmano and the plaintiffs for such loan and forbearance as aforesaid, and so secured as aforesaid, together with the annual premium, to wit, of £6 10s. 8d., on the said sum of £200, parcel of the said sum of £800, so being the excess over and above the necessary sum for securing to the said Shaw and Balmano and the plaintiffs, to wit, as trustees as aforesaid, the said sum of £350 and interest thereon as aforesaid, and all costs, charges, and expenses to be by them reasonably incurred or expended in enforcing the performance of said bond or obligation as aforesaid, so agreed to be payable for the benefit of the said United Kingdom Life Assurance Company, whereof each and every of them, the said Shaw and Balmano and the plaintiffs, was a member as aforesaid, and so secured as aforesaid during such time as the said principal sum of £350, or any part thereof, or the interest of the said principal sum or any part thereof should remain unpaid, greatly exceed the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided; whereby and by force of the statute, &c., the said supposed writing obligatory was and is wholly void. Verification.

General demurrer and joinder. The point marked for argument on the part of the plaintiff was, that the facts alleged in the plea do not amount to usury, and that the plea does not show any illegal contract on which the bond was given.

Peacock, in support of the demurrer, was stopped by the court.

G. T. White, in support of the plea. The contract set forth in the plea is a usurious contract, and the bond on which this action is brought is therefore void by the stat. 12 Anne, st. 2, c. 16, s. 1. The money which is to be ultimately recoverable on the bond is limited to £500, whereas the amount of the policy is £800. And the plea contains an averment, which overrides the whole of it, that Frederick Green, in pursuance and part performance of the corrupt and unlawful agreement, effected the policy of assurance on his life, "for the benefit of the United Kingdom Life Assurance Company." [PARKE, B. There is no averment in the plea nor anything equivalent to it, that the company were to obtain more than £5 per cent. The words, "for the benefit of the assurance company," apply to the premium, and whatever the amount of the policy may be makes no difference in the case, for there is a corresponding risk or obligation.] The plea alleges the contract to have been corrupt and contrary to the statute. [PARKE, B. Then your argument comes to this, that the allegation that the contract was corrupt necessarily implies that the company were to have a benefit beyond what the law allows. — Lord ABINGER, C. B. The plea sets forth the real contract, and that is perfectly legal and untainted with usury. The plea calls it a corrupt agreement, but that does not make it so.] In *Bac. Abr. Usury*, (C,) it is said: "It hath been resolved that an agreement to pay double the sum borrowed, or other penalty, on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower wholly to discharge himself by repaying the principal according to the bargain. But if it were originally agreed that the principal money should not be paid at the time appointed, and that such clause was inserted only with an intent to evade the statute, the whole contract is void; for the construction of cases of this nature must be governed by the circumstances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth usurious, is void, however it may be disguised by specious assurance." So, in *Sheppard's Touchstone*, by Preston, 62: "If a man desire to borrow of me £100 for a year, and I am content to let him have it for the use of £8, [the rate of interest being then £8,] but withal I compel him to take a lease of me of a house at £60 rent, which in truth is worth but £30,

this contract is usurious, and therefore the assurances thereupon are made void." Wherever more than £5 per cent. is taken, if the substance of the contract be a borrowing and lending, a slight colorable contingency will not take the case out of the operation of the statute of usury. *Richards v. Brown*.¹ In *Le Blanc v. Harrison*,² the action was in trover by the assignees of a bankrupt for silk. It appeared that the bankrupt, having borrowed from the defendant a large sum of money for a quarter of a year, was to give him £6 for every £100 for that quarter, for the use of a warehouse. The question at the trial was, whether this contract was usurious, and the jury having found a verdict for the defendant, a new trial was moved for on the ground that the verdict was against law. Holt, C. J., said, that, upon a motion for a new trial, he would not grant it in a case where the verdict was against the evidence; but that he thought it was a wrong verdict. *Bedo v. Sanderson*³ was an information for usury in this court, alleging a corrupt bargain for the use and occupation of a house from midsummer to Michaelmas, 14 Jac., £75, "et pro absentione et detentione solutionis £1,000," from the 16th of April, 1614, for six months next following, £50, "ubi revera praedict, messuagium adtunc valebat dimittendo per annum £20 et non ultra." It was objected for the defendant, first that the bargain was not shown with certainty, but generally "per viam corruptae bargan.," &c.; and secondly, that it was not shown that the house was not worth above £20 at the time of the bargain. The court, however, gave judgment for the plaintiff. [PARKE, B. That was the case of an information under a statute, in which the same particularity is not required as in a plea.] In *Wright v. Wheeler*,⁴ where a sum of £1,000 was lent on bond, conditioned for repayment of it with lawful interest, and the defendant also agreed to give the plaintiff a salary of £50 a year, it not being intended that he should perform any service for it, and the agreement being a mere shift to give £10 per cent. interest on the money lent, the court held the contract to be usurious, and that no action could be maintained upon the bond. [He referred also to *Smedley v. Roberts*,⁵ *Doe d. Titford v. Chambers*,⁶ *Lowe v. Waller*,⁷ *Scott v. Brest*,⁸ and *Doe d. Grimes v. Gooch*,⁹ as authorities to the same effect.]

¹ 2 Cowp. 770.² Holt, 706.³ Cro. Jac. 440.⁴ 1 Campb. 165, n.⁵ 2 Campb. 607.⁶ 4 Campb. 1.⁷ 2 Dougl. 736.⁸ 2 T. R. 238.⁹ 3 B. & Ald. 664.

But, secondly, this is a wagering policy on the life of Frederick Green, and as such is void under the stat. 14 Geo. 3, c. 48; and the effect of it is to taint the whole contract with illegality. The authorities on this subject are collected in Park on Insurance, 8th edit. p. 917-922; and Marshall on Insurance, 3d edit. p. 777.

N. C. Marsh
 Lord ABINGER, C. B. I am of opinion that neither of the objections taken to the validity of this contract ought to prevail. With respect to the first, I believe there is no case in which anything new is to be found on this subject since the case of the *Earl of Chesterfield v. Jansen*,¹ in which the whole law of usury was fully discussed and considered. In that case it was well said by Lord Mansfield, then solicitor general, in argument; that a bargain upon a hazard is not within the statute of usury; and so it was held by all the learned judges who determined that case. We cannot presume that this agreement was corruptly or unlawfully made, and there is nothing in the plea to show that the intention of the plaintiffs, in requiring the execution of the policy of insurance, was to get more than a legal rate of interest for their money. It appears to me that it is not usurious for an insurance company to take, by way of collateral security for a loan made by them upon a bond, a life policy effected in their own office, to a greater amount than is necessary to secure the repayment of the loan. If the plea had alleged that the amount of the premium, after allowing for the risk, had, together with the interest payable on the money borrowed, exceeded £5 per cent., that would have raised a question fit to be left to a jury to determine; but the contract stated in the plea is quite otherwise; the insurance effected on the life of Frederick Green is for his own benefit, rather than that of the insurance company, who have a risk in proportion to its amount, and must pay the £800 on his death, however soon it may happen. I think, therefore, that this transaction clearly was not usurious, and that the plea is bad.

PARKE, B. I agree with my lord in thinking that this plea is bad in substance. There is no statement in it equivalent to an allegation that more than £5 per cent. was to be reserved on the loan of money.

ALDERSON, B. I am of the same opinion. Where an agreement for the loan of money is subject to a risk, so that the lender

¹ 1 Wils. 286.

Henson v. Blackwell.

may make more or less than £5 per cent., I think it is not usurious. Here the contract is in effect this: the company agree to lend £350 on a personal bond, but stipulate that the borrower shall insure his life in their office, and deposit the policy with them as a collateral security. That is a contract which may be prejudicial or may be beneficial to the office, and which does not necessarily add to the £5 per cent. reserved upon the loan. If the agreement had been for an excessive amount of premium, that would have been colorable, and would have raised the question whether it was corruptly made, in order to evade the statute.

GURNEY, B., concurred.

Judgment for the plaintiffs.

HENSON vs. BLACKWELL.

(4 Hare, 434. Coram Wigram, V. C. 1845.)

Insurable interest. Title to policy.—A debtor and his wife joined in an assignment of the *chose in action* of the wife, to a creditor of the husband, to secure £300 owing by the husband. The creditor afterwards insured the life of the wife in a sum of £200. The *chose in action* was not reduced into possession in the lifetime of the wife. The wife died, and the creditor received from the insurance office the £200: *Held*, in a suit for redemption, that if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum assured towards the payment of his debt; that here the creditor had such insurable interest, but the risk ceased at the death of the wife; and that the money afterwards paid by the insurance office, being paid in their own wrong, the debtor was not entitled to have it applied in reduction of his debt.

ANN WEBB, under the will of Francis Webb, her uncle, who died in 1814, was entitled, on the death of her father, Edward Webb, to one fifth share of a moiety of an annuity of £300, which had been granted for the term of sixty years, if two persons, (the grantors,) or the survivor of them, should so long live; (subject to the contingency of a certain trade or business producing to the grantors, or the survivor of them, a specified amount of profit;) and was also entitled, under the same will, on the death of her father, to a fifth part of a legacy of £700, with interest thereon from his death. In 1822, Ann Webb intermarried with the plaintiff. The legacies were not made the subject of any settlement. Edward Webb, the father, died in 1828.

By an indenture of assignment, dated in August, 1831, made between the plaintiff and the said Ann, his wife, of the one part,

and the defendant, John Blackwell, of the other part, reciting the will of Francis Webb, and that the plaintiff was indebted to the defendant in the sum of £300, upon a promissory note of the same date as the indenture, bearing interest at five per cent., — the said plaintiff, William Henson, and the said Ann, his wife, and each of them, assigned unto the defendant, John Blackwell, his executors, administrators, and assigns, all that the said annuity, and all and every annual or other sum or sums of money whatsoever which they were entitled to under or by virtue of the recited clause of the will of the said Francis Webb, and all other interest, benefit, and advantages whatsoever of the said plaintiff and Ann, his wife, by virtue thereof, upon trust to retain the same from time to time, when received in liquidation of the said sum of £300, due from the plaintiff to the defendant, with interest thereon, and the costs and expenses of preparing the said assignment, and incident to the execution of the trusts thereby created ; and it was thereby agreed, that, in the event of the death of either of the grantors of the annuity, if the defendant, his executors, or administrators should be desirous of insuring the life of the survivor of them, it should be lawful for him and them so to do, to the amount of the said debt, or of such part thereof as should remain unpaid ; in which case all sums of money to be paid for effecting and continuing such insurance should be considered as added to the debt, so due as aforesaid, from the plaintiff to the defendant, and be recoverable in like manner.

Some payments of the share of Ann Henson of the annuity were made to the defendant under the assignment, the first of which he received in July, 1832. These payments were, however, interrupted, in consequence of a suit in chancery on the subject of the administration of the estate of Francis Webb, and ultimately in consequence of a notice by the plaintiff to the survivor of the grantors, requiring him not to pay the defendant. The defendant, also, after the death of Ann Henson, received a balance of £59, in respect of the pecuniary legacy to her, which had been assigned to him by the deed.

In August, 1832, the defendant, without the privity or knowledge of the plaintiff or of his wife, insured the life of Ann Henson, the wife, in the Norwich Union Life Assurance Office, in the sum of £200. The defendant paid the expense and premiums on the policy from time to time, as they became due, amounting to

about £22 ; and, by his answer in this cause, he stated, that he didn't charge such payments to the account of the plaintiff, but treated them as being made entirely on his own account and at his own risk. The plaintiff's wife died in February, 1835, and, on the application of the defendant to that effect, the plaintiff soon afterwards furnished him with a certificate of her burial. The Norwich Union Office, in July, 1835, paid the defendant the £200 secured by the policy. The plaintiff took out letters of administration of the estate of his wife, and filed his bill to redeem the property comprised in the assignment of August, 1831, praying that the defendant might be charged with the amount he received on the policy, after allowing him the premiums and expenses paid upon it.

Mr. *Romilly* & Mr. *Grove*, for the plaintiff. The insurance by the defendant of the life of Ann Henson must be founded on the fact of the existence of the security. That was the only fact to which it can be referred ; for, unless he had an interest in her life on that ground, it is not suggested that he had any such interest whatever ; and the insurance would have been illegal under the statute 14 Geo. 3, c. 48. But the court will not intend, nor (for the purpose of excluding the plaintiff from the benefit of the policy) will it hear the defendant say, that he intended to do, or had done, an unlawful act. The court will regard the defendant as having obtained and intended the policy of insurance as a collateral security for the debt ; and will treat the money received by the defendant on the policy upon the death of Ann Henson, as having been received in part discharge of the debt, allowing the defendant thereout the premiums which he had paid.

Mr. *Cooper* & Mr. *Wright*, for the defendant. The insurance by the defendant of the life of Ann Henson was not made in pursuance of any contract with the plaintiff. It was the voluntary act of the defendant. There was nothing in the transaction to connect it with the plaintiff's mortgage. It was true, there was the circumstance, that the plaintiff happened at the time to owe the defendant a sum of money, to secure which the plaintiff and his wife had assigned to him some property ; but as to the transaction of the insurance, they were entire strangers. What might have been the responsibility of the defendant under the statute, or whether he incurred it by mistake or advisedly,

was not material to the account in this suit, and was no foundation for relief in equity against him. Park on Insurance, by *Hildyard*, vol. ii. p. 905; Hughes on Insurance, 498; and the following cases were cited: *Godsall v. Boldero*; ¹ *Holland v. Smith*; ² *Clark v. The Inhabitants of the Hundred of Blything*; ³ *Halford v. Kymer*; ⁴ *Ex parte Andrews, In re Emmett*; ⁵ *Philips v. Eastwood*; ⁶ and *Humphrey v. Arabin*.⁷

VICE-CHANCELLOR. The plaintiff, under the will of a gentleman of the name of Webb, was entitled in right of his wife to an interest in personal property which was not capable of being reduced into possession. *Stiffe v. Everitt*.⁸ The plaintiff was at the same time indebted to the defendant to the amount of £300, and the plaintiff and his wife assigned to the defendant the interest which the husband had in the wife's property as a security for the debt. After the assignment, but without the knowledge of the debtor or his wife, the creditor effected a policy of insurance on the life of the wife with the Norwich Union Office, for a sum not agreeing in amount with, but less than the debt, — a sum of £200. The policy, in its terms, contains no reference to the particular security which the defendant held.

The wife of the debtor died in the lifetime of the husband, and upon her death the defendant received from the Norwich Union Office the amount secured by the policy. The plaintiff has since filed his bill for the redemption of the mortgaged property, insisting that the money received from the office ought to be set off against the debt, and that the security should be discharged upon payment of the balance.

If, in such a case, I should decide against the plaintiff, he will not have to complain that he has to pay more than the amount of his debt. His complaint could only be that he had not to pay less than his debt. If I decide against the defendant, he will not be a loser of his debt; he will still be paid in full, unless, indeed, the rule of law relied upon by the plaintiff would not make allowance for the premiums paid on the policy. Abstractedly, therefore, it is difficult to say that in either way injustice would necessarily be done. The contest is, which of the two parties is to have

¹ 9 East, 72.² *Ante*, p. 2.³ 2 B. & C. 254.⁴ *Ante*, p. 4.⁵ 1 Madd. 573; *S. C.* 2 Rose, 410.⁶ Lloyd & Goold, temp. Sugd. 270.⁷ Lloyd & Goold Ca. temp. Plunket, 318.⁸ 1 Myl. & Cr. 37.

the benefit of a sum of money received from a third person, not as the fruit of any contract, or the result or sequence of any communication between the parties. The plaintiff was wholly ignorant that the policy was effected, and there was no contract in the deed of assignment authorizing the defendant to effect any such policy. There was, indeed, a clause authorizing the debtor to effect a policy of insurance, but that was for an entirely different purpose; it was to guard against the extinction of the *chose in action*, which was the subject of the security, and had no reference to the events out of which this suit has arisen.

Such being the circumstances of the case, one question made in the argument was, whether the defendant, the creditor, had an insurable interest in the life of the plaintiff's wife; or whether, in fact, the policy was not void from the beginning for want of such interest. If the defendant had no such interest, I should have great difficulty in finding any ground for admitting the plaintiff's claim. Assuming that, if the defendant had an insurable interest, the court would refer the policy — though silent upon the subject — to that interest; yet, if the defendant had no such insurable interest, there is no judicial reason that occurs to my mind for referring the policy to the debt which happened at the same time to be owing by the husband. In the absence of an insurable interest in the life of the wife, and of any evidence to connect the policy with the husband's debt, I cannot intend that the policy was effected as a guarantee against a risk in which (by the supposition) the defendant had no interest. The mere fact that the wife joined in assigning her interest with her husband would not give the assignee an insurable interest in her life, if the interest did not arise from the nature of the transaction. The creditor might have made a false representation to the insurance office when he applied for the policy, and the office may have paid the amount of the insurance in their own wrong upon a void policy; but it would by no means follow from these premises that the court must hold the plaintiff entitled to that which had been so wrongfully paid and wrongfully received.

In order that the question intended to be raised by the plaintiff may arise, it must, I think, be made out that the defendant had an insurable interest in the life of the plaintiff's wife; and my impression certainly is, that the defendant had, at the time he effected the insurance on the life of Mrs. Henson, a sufficient

interest in her life to render the insurance lawful. The event, against the consequences of which it was his interest to guard, was the death of the husband, leaving the wife surviving. In that event the defendant might have lost the benefit of his security on the mortgaged property, and the debt for which it was given. If that event had happened, and the insurance had been on the life of the husband, the same event which took away his security would have entitled him to payment of the policy. If the same event had happened, the insurance on the life of the wife would have been the only remaining security for the debt in case of the husband's insolvency. The defendant therefore had, I think, an insurable interest in the life of the plaintiff's wife; he had a right to a guarantee against the consequences of her surviving the plaintiff. The event I have supposed did not, however, happen. The wife died in the lifetime of her husband; and the question is, whether the determination of the contingency against which the creditor had a right to be protected did not as completely discharge the guarantee, as did the payment of Mr. Pitt's debt in the case of *Godsall v. Boldero*.¹

If, then, the defendant had (as I think he had) an insurable interest, there was an interest to which the court might, and I think ought, to refer the policy, although the policy itself contains no express reference to that interest; and although there is no extrinsic evidence to show that it had reference to this particular transaction. Taking it, therefore, for the present that the defendant had an insurable interest, can he retain to himself the benefit of the money which has been paid upon the policy? The case of *Godsall v. Boldero* is the leading case on the subject. In that case, Houlditch, a coachmaker, was a creditor of Mr. Pitt, and effected a policy on Mr. Pitt's life. Mr. Pitt died, leaving the debt still due. The executors of Mr. Pitt, not out of his assets, but out of money obtained *aliunde*, paid the debt; and, the insurance office afterwards refusing to pay the amount secured by the policy, an action was brought against them to recover it. The decision in that case was, that it was a contract to indemnify Houlditch against loss; and that, as the debt had been paid, (no matter from what source,) no loss had been sustained, and the money could not be recovered. Now, the case before me is not

¹ But see *Dalby v. India & L. Life Ins. Co.*, ante, vol. 2, p. 371.

one in which the creditor has been paid his debt, and seeks to recover upon the policy notwithstanding such payment. It is a case in which the creditor has recovered the money under the policy, and the debtor is endeavoring to obtain the benefit of that payment, by procuring it to be applied in reduction of his debt. The two cases are, therefore, distinguishable in form, and may, perhaps, be thought distinguishable in principle also ; for the case of *Godsall v. Boldero*, and others to the same effect, have only decided what, as between two contracting parties, was the meaning of the contract, which one of them sought to enforce against the other. In this case a person, who is a mere stranger to the contract, requires me to decide in his favor, first, what the contract was between his creditor and the insurance office ; and secondly, that he (the debtor) is entitled to the benefit of that contract, to which, in fact, he was an entire stranger. I do not say that there is anything in principle which should necessarily exclude him from the right he claims. I do not say, that, if a stranger goes to a creditor of A B, and offers to pay A B's debt, and the creditor accepts payment of the debt from that stranger, there is any reason why the debtor, on being sued for the same debt, should not be allowed to adopt the act of the stranger and say : " My debt has been paid ; you have accepted payment in full of the demand." If that may be done, the case would be the same in substance if a stranger, for a valuable consideration, became guarantee for another. The case of *Ex parte Andrews*¹ is an authority in point, for, although Sir Thomas Plumer ultimately rested his opinion on the fact that it was the case of a trustee, he stated the law as clearly as possible in favor of the proposition contended for by the plaintiff. In *Humphrey v. Arabin*,² Lord Plunket appears to have intimated a doubt whether the law could be, as I consider it to have been, laid down in the cases. By these cases, according to my view of them, I am bound. It appears to me, as I have already intimated, that the defendant had an interest sufficient to entitle him to the guarantee, which according to *Godsall v. Boldero* and the other cases, was all he acquired by the insurance. Upon the death of the wife in the lifetime of the husband, there was no longer any risk, and the question arises, whether the guarantee was not as completely discharged by that

¹ 2 Rose, 410 ; S. C. 1 Madd. 573.

² 1 Lloyd & G. temp. Plunket, 322.

event — the only thing to be guarded against having become impossible to happen — as it was in *Godsall v. Boldero*, where the party received payment of the debt. The question is purely a legal question, and is of sufficient importance to justify me in saying, that if either party would wish to take the case to a court of law, I ought to allow him to do so.

The counsel on both sides stated it to be the wish of the parties to obtain his honor's decision rather than to carry the case to a court of law.

The VICE-CHANCELLOR. My opinion is against the plaintiff. If it had been a void policy from the beginning, he could claim nothing. I think that it was not void from the beginning; that the creditor had an insurable interest, but his right was only to effect a policy which should guarantee him against the loss which he might have sustained if the wife had survived the husband. She did not survive her husband. The risk intended to be guarded against was at an end; and I think that when the risk ceased, the guarantee must be considered as satisfied.

The plaintiff is entitled to his decree for redemption. There may be a declaration that he is not entitled to have the amount received on the policy set off against the mortgage debt. I give no costs to the hearing.

DORMAY vs. BORRADAILE.

(10 Beav. 335. Coram Langdale, M. R. 1847.)

Covenant to keep policy in force. Suicide. — A party covenanted to perform all matters requisite for keeping a life policy on foot. *Held*, that this covenant could not be read negatively, as if he had covenanted to do no act whereby the policy would be avoided, and therefore that the covenant was not broken by the suicide of the covenantor — a thing whereby the insurance was forfeited.

IN 1828, Mr. Borradaile, in contemplation of marriage afterwards solemnized, effected a policy of insurance on his life for £1,000. The policy was granted on certain conditions, among which was this: That if the grantee "should die by his own hands" the policy should become void.

By indenture of June 26, 1828, Mr. Borradaile assigned the

Dormay v. Borradaile.

policy to trustees, and he covenanted, *inter alia*, that he would, "at all times during his life duly pay all such premiums and other moneys, and do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot the policy."

On the 20th of March, 1838, Mr. Borradaile was found drowned in the river Thames, and Abraham Borradaile proved his will.

The trustees of the indenture having applied in vain for payment of the money secured by the policy, commenced an action against the grantors in 1839. The cause was tried in 1841, and the jury found that "the Rev. William Borradaile voluntarily threw himself into the river Thames, intending to destroy his life; but that, at the time of committing the act, he was not capable of judging right from wrong." In conformity with this finding, it was an admitted statement in the case, "that on or about the 16th of February, 1838, Mr. Borradaile threw himself into the river Thames, intending to destroy his life; but not being capable at the time of distinguishing between right and wrong, and thereupon, and in consequence thereof, he was drowned and died."

Upon the finding of the jury in the action, a verdict was entered for the defendants, under the direction of the court; but leave was given to apply to set aside such verdict, and enter a verdict for the plaintiff for the amount insured by the policy, and interest thereon. A rule nisi to set aside the verdict was argued in Trinity term, 1842; and in Easter term, 1843, the rule was discharged. Tindal, C. J., however, expressed an opinion in favor of the plaintiff.¹

The trustees having thus failed to establish their claim against the insurers, endeavored to establish a debt against the estate of Mr. Borradaile, upon the covenant that he would perform all things requisite to keeping the policy in force. This creditors' suit having been instituted for the administration of the estate of William Borradaile, deceased, and a decree made therein for taking an account of his debts, a claim for a sum of £1,000 and interest was made by John Watson Borradaile and others as trustees of the settlement. The claim was allowed by the master; but upon exceptions taken to his report, it was, on the 24th of November, 1845, ordered that a case should be made for the

¹ These proceedings took place in *Borradaile v. Hunter*, ante, vol. 2, p. 280.

opinion of the judges of the court of common pleas, upon the question whether the trustees were entitled, under the covenant contained in the indenture, to recover the sum of £1,000, secured by the policy in the pleadings mentioned, from the executor of the testator? The case was accordingly made and argued before the judges of the common pleas, who certified their opinion that the trustees of the indenture were not entitled, under the covenant therein contained, to recover the sum of £1,000 from the executor of William Borradaile.

The case now came on for consideration upon the equity reserved; and the trustees of the settlement desired that the case might be reconsidered at law.

Mr. *Kindersley* & Mr. *Campbell*, for the plaintiff, supported the certificate of the judges, and contended that there had been no breach of the testator's covenant, he not having omitted to do or perform any act requisite to keep the policy on foot. Secondly, that the testator was not responsible for an act done by him when in a state of mental incapacity.

Mr. *Roupell* & Mr. *Roundell Palmer*, for the trustees of the marriage settlement. The policy on the life of the testator having been avoided by his act, his estate is liable in damages for the breach of covenant.

A covenant is to be construed according to the intent and meaning of the parties, and no particular form of words is necessary to constitute an obligation by covenant, for "any words in a deed which show an agreement to do a thing, make a contract." Comyn's Dig. Covenant (A. 2), (a). If a party covenant to do every act and deed necessary to preserve a thing, he is, negatively, restricted from doing any act to destroy it. There are many cases in which acts, not within the letter of a covenant, have been held to be within its spirit and the intention of the parties. "If a man acts contrary to the intention of the covenant, it shall be a breach, though he performs the words of the covenant; as if a covenant be to deliver a recognizance to be cancelled, it is a breach if he extends it before, though it be afterwards cancelled." *Robinson v. Amps*, T. Raym. 25. So if a brewer covenants to deliver all his grains for the cattle of the plaintiff, and he puts hops to them before delivery, it is a breach of the covenant, "because the intention of the parties is to be considered in all contracts; and it was the intent of the parties here that the plaintiff should

have the grains for the use of his cattle, and they will not eat them when hops are put into them. So if I covenant that I will leave all the timber which is growing on the land I hire upon the land at the end of the term, if I cut it down, though I leave it on the land, it is a breach of my covenant. So if I covenant to deliver so many yards of cloth, and I cut it to pieces, and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and doth discountenance all such acts as are in *fraudem legis*. Again, in the case of the *Duke of St. Albans v. Ellis*, 16 East, 352, a lessee covenanted to plough, &c., the premises, except the rabbit warren and sheep walk, in a due course of husbandry. It was held to be a breach of the covenant for the lessee to plough up the warren and sheep walk; the court considering that the object of the exception was to "negative the doing thereof; or, in other words, to agree that it should not be done." The same principle of looking to the intent, rather than to the strict words, applies also to conditions. Comyn's Dig. Condition (M. 1).

Now, apply the same principle to the facts of the present case. The testator, by the settlement, intended to make a certain provision for his wife and family, and for that purpose effected a policy, and covenanted to pay the premiums, and to do and perform all acts, matters, and things requisite for keeping the policy on foot. Now, what positive acts can be referred to? Not the payment of the premiums, for that is provided for by the express covenant. It must refer to the other acts requisite for keeping on foot the policy. These are contained in the condition for avoiding the policy, and are these. [Here counsel named the various conditions in the policy, all of which were negative in character.] It is plain that the whole aim and intention of the parties was to provide for the due keeping on foot of the policy; but it will be seen that there is no positive act (except the payment of the premiums) required to be done to keep the policy on foot; but certain acts are specified, on the doing of which it is to be avoided. It is therefore evident that the covenant applies negatively to those other acts, the infraction of which will avoid the policy; and it amounts to an engagement to refrain from doing them, for unless it does, there is nothing to which it can apply, or on which it can operate. If, therefore, he had gone beyond Europe, or entered the military service, or done any other act the consequence

of which would have been to defeat the policy and frustrate the intention of the parties, he would have become liable in covenant.

On the second point they contended that by voluntarily throwing himself into the Thames, intending thereby to destroy his life, though not being capable of distinguishing between right and wrong, the testator had committed a breach of the covenant; for if a lunatic hurts a man, he shall be answerable in trespass, though if he kills him it is not a felony. 1 Inst. 247; Hawk. P. C. 2; *Weaver v. Ward*, Hob. 134; *Owen v. Davies*, 1 Ves. Sr. 82; *Hales v. Petit*, Plowd. 253; *Clift v. Schwabe*, ante, vol. 2, p. 312; Viner's Abr. Lunatic (G).

The MASTER OF THE ROLLS, after referring to the circumstances of the case, and to the extreme vagueness of the expression "capable of judging right from wrong," said the difficulty of the case required that he should give it his further consideration.

The MASTER OF THE ROLLS, several weeks afterwards. It is said justly that covenants are to be construed according to the intent of the parties; and then it is argued that this covenant must be understood negatively, as if it had been, that the grantee would not do anything by which the policy should be forfeited.

It does not appear to me that I can give this effect to the words of the deed. The subject of the settlement was the policy and the money payable thereon, and nothing else; that which he covenanted to do he did; and these are not, I think, words to which the negative effect contended for can be properly attributed. From the object of the settlement, and the words of the covenant, I cannot imply an intended obligation not to destroy his own life, or to pay so much money if he did destroy it; and I do not see any sufficient reason for not being satisfied with the opinion certified by the learned judges.

I think that this case has been embarrassed by the terms in which the jury delivered their verdict, on the trial of the action, and by which the parties have agreed to be bound. I suppose that each party hoped to derive some benefit, in his own sense, from the ambiguity; but I do not think that insanity is the necessary state of mind of a man who voluntarily does an act which he intends to do, at a time when he is stated in general terms to be not capable of distinguishing between right and wrong.

The expression "distinguishing between right and wrong" is very frequently employed, without any intention to suggest that the person to whom it is applied is incapable of distinguishing between right and wrong on any occasion, on any subject, or for any purpose whatever; and it is plain that a person may be capable of judging between right and wrong on particular occasions without being insane, either because he wants the requisite knowledge and experience, or wants reasoning powers equal to the occasion, though quite sufficient to sustain the character of a man of sense and understanding on ordinary occasions, or on occasions less difficult.

My opinion on the present case is, however, wholly independent of the effect of the particular verdict on the special statement in this case which was adopted from the verdict. I do not think that the self-destruction of the testator made the trustees of the settlement creditors entitled to establish a debt against the testator's personal estate.

JOSEPH NEALE, executor of William Neale, *vs.* MOLINEUX & others.

(2 Car. & K. 672. Queen's Bench, N. P. 1847.)

Title to Policy. — In detinue by the executor of N. against M., a banker, for a policy of insurance on the life of S., M. pleaded that the policy was not the property of N., and also that N. had *fraudulently* permitted S. to hold the policy and represent that he was entitled to the money secured by it, and that he did so represent to M., who lent him money on it. Replication, denying the fraudulent permission. S. had insured his own life in 1831, and by deed assigned the policy to N. in 1832, who gave notice of the assignment to the office, and paid all the premiums afterward. S. retained the policy till he deposited it with M. on a loan of money in 1843. *Held*, first, that the property in the policy passed to N. by the deed of 1831, although he had no possession of the policy; and secondly, that though N. had been guilty of negligence in allowing S. to retain the policy, the defendant had not proved his special plea, unless the jury were satisfied that N. intended that S. should borrow money of some one, and left the policy in S.'s hands in order that he might cheat some one by borrowing money on it; and the judge would not ask the jury what they would have found if the word "fraudulently" had not been inserted in the plea.

DETINUE by the plaintiff, as executor of William Neale, for "a certain instrument in writing, to wit, a certain policy of assurance, bearing date, to wit, on the 5th day of March, A. D. 1831, and numbered, to wit, 3,466, under the hands of three of the directors

of the Law Life Assurance Society, London, whereby the sum of £1,000, on certain events therein mentioned happening, was assured to one Thomas Scott, clerk, to be paid to his executors, administrators, or assigns, to wit, within three calendar months after proof of the death of him the said Thomas Scott, clerk, of great value, to wit, of the value of £2,000.

Pleas, *first, non detinent* ; *second*, " that the said William Neale was not lawfully possessed as of his own property of the said policy of assurance, in manner and form," &c. ; *third*, that William Neale in his lifetime *fraudulently* permitted and suffered Thomas Scott to hold the policy of assurance, and to represent that he was entitled to the money secured thereby, and that he so represented to the defendants, and that they believing him, and having no notice of any right or title of William Neale, advanced him £250 on it.

Replication to the first plea, and to the second plea *a similiter* ; and to the third plea, that William Neale did not fraudulently suffer or permit the said Thomas Scott to hold the said policy of assurance, or to represent to the defendants that he was entitled to the money secured thereby.

The third plea and the replication to it were in the following form : —

Third plea. And for a further plea in this behalf, the defendants say, that the said William Neale in his lifetime *fraudulently* permitted and suffered the said Thomas Scott to retain and hold the said policy of assurance, and to represent to the said defendants that he the said Thomas Scott was lawfully possessed of the said policy and entitled to the money secured thereby ; and that the said Thomas Scott in his lifetime, to wit, on the 11th day of September, A. D. 1843, produced the said policy of assurance to the said defendants, and represented himself as the lawful owner thereof and entitled to the money secured thereby ; and that they, the said defendants, believing the said Thomas Scott to be the lawful owner of the said policy and entitled to the money secured thereby, and having no notice of any claim, right, or title of the said William Neale to the same or to the money secured thereby, or any part thereof, did then, and in the lifetime of the said Thomas Scott and William Neale, and at the request of the said Thomas Scott, to wit, on the day and year last aforesaid, advance and lend to him, the said Thomas Scott, a large sum of money,

to wit, the sum of £250, on the security of the said policy of assurance and of the money secured thereby; and that the said Thomas Scott, being then the holder of the said policy of assurance, did then, to wit, on the day and year last aforesaid, deposit the same with the defendants as a security for the money so advanced by them to him the said Thomas Scott as aforesaid, with interest for the same. And the defendants further say, that from thence hitherto they have held and detained, and do still hold and detain, the said policy as a security for the money so advanced and lent by them to the said Thomas Scott as aforesaid, and interest for the same; and which money, with a large arrear of interest thereon, amounting together to a large sum of money, to wit, the sum of £500, still remains due and owing and unpaid to the defendants, wherefore the defendants still detain the said policy from the said plaintiff as such executor as aforesaid, as they lawfully may for the cause aforesaid. And this the defendants are ready to verify, &c.

[Signed]

Rupert Kettle.

Replication to the third plea. And the plaintiff, as to the plea of the defendants by them lastly above pleaded, saith, that the said William Neale did not fraudulently suffer or permit the said Thomas Scott to retain or hold the said policy of assurance, or to represent to the defendants that he the said Thomas Scott was lawfully possessed of the said policy, or entitled to the money secured thereby, in manner and form as in the last plea is alleged; and this the plaintiff prays may be inquired of by the country, &c.

It was opened by *Whitehurst*, for the plaintiff, that Mr. William Neale, who had been a builder, had built a rectory-house for the Rev. Thomas Scott, the rector of Nether Broughton, in Leicestershire, and Mr. Scott having, on the 5th of March, 1831, insured his own life in the Law Life Assurance Office for £1,000, he, by a deed executed on the 15th of October, 1832, assigned the policy to Mr. William Neale, who soon afterwards gave notice of that assignment to the insurance office. After the death of Mr. William Neale, in 1838, the policy could not be found among his papers, but the plaintiff kept on paying the premiums as Mr. William Neale had done in his lifetime, and Mr. Scott having died in the year 1846, it was ascertained that, in the year 1843, Mr. Scott had deposited the policy with the defendants, who were

bankers at Lewes, to secure a sum of £250, which they had then advanced him on two promissory notes. The defendants had pleaded that Mr. William Neale had fraudulently permitted Mr. Scott to represent that he was entitled to the money secured by the policy, which was not possible, as Mr. William Neale died in 1838, and no representation could have been made to the defendants till 1843.

This was an attempt to import the equity, which arises when a mortgagee allows the deeds to remain with the mortgagor, into a case of detinue, and the defendants might have known of the assignment to Mr. William Neale by applying at the insurance office.

The policy and the assignment were put in, and evidence was given of the payment of the premiums and the value of the bonuses, and that notice of the assignment was given at the insurance office in 1832.

Crowder, for the defendants. Mr. William Neale and the plaintiff both allowed Mr. Scott to have the possession of a policy on his own life. Was there not a guilty negligence in them, as thereby Mr. Scott had the *indicia* of property? It has been said that the defendants should have asked at the office whether there was an assignment. I believe that that is unusual, and that insurance offices do not answer inquiries of that sort; and there was on the other side negligence to such an inordinate extent that I shall ask you to find fraud, as Mr. William Neale, by his conduct, enabled Mr. Scott to cheat any banker whatever. If a mortgagee leaves the title deeds of the mortgaged estate in the hands of the mortgagor, and he borrows money of another person on a second mortgage with the deeds, the latter has the preference; and in the case of *Head v. Egerton*,¹ Lord Talbot, C., says, that in such a case, the mortgagee is accessory in drawing in the second mortgagee to lend his money, by permitting the mortgagor to keep the title deeds in his possession; and in the case of *Harrington v. Price*,² Lord Tenterden adverts to a

¹ 3 P. W. 280.

² 3 B. & Ad. 170. In that case, which was an action of trover for the title deeds of certain land, it appeared that James Brograve had sold the land to a purchaser, under whom the plaintiff claimed, but that Brograve had kept the deeds, and subsequently mortgaged the land to the defendant and given him the deeds. The court held the plaintiff entitled to recover; and Lord Ten-

mortgagor retaining possession of the title deeds as a circumstance calculated to mislead.

PATTESON, J. (in summing up.) There has in this case been a fraud committed by Mr. Scott; but you will have to say whether the case comes within the terms of the third plea, for whatever may be the rights of the parties in equity, the question here is, whether Mr. William Neale "in his lifetime fraudulently permitted and suffered" Mr. Scott to hold the policy and represent to the defendants that he was lawfully possessed of it, and entitled to the money secured by it. With respect to the first and second pleas, there is no doubt; as to the first, that the defendants detain the policy; and as to the second, although there is no evidence that Mr. William Neale ever had corporal possession of the policy, yet by the deed of assignment of the 15th of October, 1832, the actual property in the policy is virtually transferred to him; and as this deed does transfer it to Mr. William Neale, he has the legal property in it, though not actually in his possession. In the third plea it is stated that Mr. William Neale fraudulently (it is not said negligently) suffered Mr. Scott to have the policy, and to make the representations there mentioned. There is no evidence that he ever allowed Mr. Scott to make any representation at all to the defendants, and as he died five years before the defendants lent the £250, it is hardly possible to suppose that he knew anything about the defendants. Mr. Crowder puts it as a sort of fraudulent permission to cheat anybody. There must have been considerable negligence in Mr. William Neale; his proper course was to have had possession of the policy, and there is no reason assigned as to why he had not. He and his executor paid all the premiums, and he had given notice of the assignment

terden, C. J., said: "It is an established principle that whoever is entitled to the land has also a right to all the title deeds affecting it. But it is contended that the purchasers here were negligent in not securing the title deeds, but leaving them in the hands of the vendor. Fraud is not suggested, (which might have made a difference,) but only a neglect by which a vendor has been enabled to commit a fraud." And Mr. Justice Littledale said: "The plaintiff has the legal right to these deeds. It is clear there was no fraud on his part, and if he has been guilty of negligence, this court cannot say that his title is not good." And Mr. Justice Patteson said: "This is put by the defendant on the ground of negligence; but it is clear that unless there was such negligence as amounted in effect to a fraud, the plaintiff must recover on his strict legal right."

Edge v. Duke.

at the office. He may have been guilty of negligence, but the third plea does not put it upon negligence, and if it had, it would have raised a question whether that was a defence at law. You have, therefore, to say whether Mr. William Neale in his lifetime intended that Mr. Scott should borrow money of some one on this policy, and fraudulently left this policy in Mr. Scott's hands in order that he might cheat some one by borrowing money upon it.

Crowder. Would your Lordship ask the jury what they would find on this plea without the word "fraudulently," as the plea might be good without that?

PATTESON, J. I think I cannot do that; for if the plea had been pleaded without the term "fraudulently," the plaintiff might have demurred to it.

Whitehurst. No doubt we should.

Verdict for the plaintiff on all the issues.

Whitehurst & Macauley, for the plaintiff.

Crowder & Kettle, for the defendants.

Attorneys, Loftus & J. J. Millard.

EDGE vs. DUKE.

(18 Law J. Ch. 183. Coram Shadwell, V. C. 1849.)

Lapsed policy. Waiver. — A loan was granted by an insurance company upon a bond with sureties, and a policy on the life of the borrower as collateral security. The premiums, after the first, were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond; they refused to pay, and pleaded *non est factum* and payment. Upon a suit instituted to restrain such actions, and it being contended that the demand by the company, after the policy "was actually void," had revived it: *Held*, that such revival was neutralized by the fact of refusal to pay, and the bill was dismissed with costs.

IN this case Frederick Edgell, in the month of July, 1843, applied to the Victoria Life Assurance and Loan Company to lend him £200, which they agreed to do upon having the same, with interest at £5 per cent. secured by a bond, with four sureties, and also by a policy of assurance upon his life, to be held by them as a collateral security. The plaintiffs, Thomas Edge, George Ledwell Taylor, William Steel, and Samuel Dutton, agreed to become sureties, and a policy of insurance for £400, dated the 13th of July, 1843, was effected, upon which the first yearly premium of £18 7s. 4d. as usual, was paid at the same time; and one of the conditions of the policy was, that it should become void unless

the premiums were actually paid within thirty days after the day at which they respectively became due ; and the policy was signed by the defendants, Sir James Duke, Benjamin Hawes, Benjamin Barnard, and Charles Baldwin, as directors of the company. On the same day, the £200 agreed to be lent by the company was advanced, the policy deposited with the defendants, and a bond executed, by which the assured, and the plaintiffs as his sureties, became jointly and severally bound to the defendants in £400, subject to a condition for making void the said bond, upon payment by the assured and the plaintiffs, or either of them, of the £200 so lent to the defendants by three equal instalments of £66 13s. 4d. each, on the three successive 13th days of July, 1844, 1845, and 1846, respectively, or the day of the death of the assured, which should first happen, with interest upon what remained due at £5 per cent., and that the premiums should be kept up, with interest on such premiums, from the time when they ought to have been paid, provided the defendants should regard the policy as subsisting, notwithstanding the premiums should not have been duly paid ; and then followed the usual clause as to the appointment of new sureties in case of death, absence, or bankruptcy ; and that in case of default in payment of the interest, instalments, or premiums, the whole principal sum secured should immediately become payable. On the 13th of July, 1844, default was made by Edgell in payment of the instalment, interest, and premium ; and Mr. William Ratray, the actuary of the company, applied to the sureties, and a correspondence took place, in which the payment of the instalment, interest, and premium was insisted upon, and continued until the 25th of October, 1844, which was after the thirty days' grace had expired, when the plaintiffs paid all three claims, amounting to £90 19s. 7d., which was accepted by the company. On the 13th of July, 1845, default was again made in payment of the instalment, interest, and premium, and for thirty days after.

A correspondence then took place between the company's officer and the plaintiffs' and the defendants' solicitor, the plaintiffs suggesting that before any proceedings, which the company threatened, were taken against them, the insured should be sued ; and accordingly, on the 20th of September, 1845, an action was commenced by the company against him, and he appeared, but the action was not proceeded with. In November following separate actions were brought against the plaintiffs for principal and inter-

est on the bond for the premium, and these actions were consolidated. On the 21st of April, 1846, notice of trial was given, and on the 28th Frederick Edgell died. On the 18th of June administration was granted to H. P. Edgell, a defendant in the suit, and proof was made to the company of Frederick Edgell's death. The plaintiffs applied to the defendants to have a sufficient part of the £400 insured applied in satisfaction of the sum sought to be recovered in the actions, and upon their refusal, on the ground that the policy was not subsisting by reason of the non-payment of the premiums, the present bill was filed, stating the above facts, setting forth the correspondence which had taken place, and charging that, however the policy might have been forfeited in strictness, the company had waived their right to consider it so by their acceptance of the premiums: and praying that it might be declared that the policy was still valid and subsisting, and if it became lapsed the lapse was waived by the company; for an account on the policy and loan, and that the defendants might be decreed to apply a competent part of the moneys insured in satisfaction of the debt due on the bond, and out of the balance to pay the plaintiffs the sum of £90 19s. 7d., so paid by them for Frederick Edgell, and their costs; to deliver up the bond to be cancelled, and for an injunction to restrain the actions.

The defendants put in their answer, stating that Frederick Edgell had represented the plaintiffs as indebted to him, as director in a dissolved company, and had agreed to repay the loan to the defendants' company. That by the conditions upon which policies were granted by them, a lapsed policy by non-payment of premiums might be revived within three months, on proof of good health of the party, but when void, all additional sums were forfeited. The answer then admitted the transactions which had taken place, and stated that the policy became void; admitted the waiver by the company; set forth the correspondence, but denied that by the actions they had in fact waived their right to consider the policy forfeited. That the plaintiffs refused to pay the money sought to be recovered in the actions, and pleaded *non est factum* and payment. That the declaration was amended before the 1st of April, confining the action to the bond only.

In July, 1846, the action was tried and a verdict for the plaintiff at law obtained for the loan and interest in pursuance of the amended declaration, but further proceedings were stayed by the institution of this suit, upon which the common injunction was

obtained, which remained in force until December, 1847, when it was dissolved, and the cause now came to a hearing.

Mr. *Bethell* & Mr. *Malins* appeared for the plaintiffs, and contended that the insurance company had elected to treat the policy as an existing policy. At the end of thirty days after the premium became due, the policy would no doubt have been at an end had not the company treated it as an existing policy by bringing action for the premiums. The question therefore was, whether the company were not bound by their acts, and whether the policy did not continue to exist. [The VICE-CHANCELLOR. If you had complied with their request, and paid the premiums, and the company had received the premiums, then the case would have been different, but the premiums were applied for, but not paid.] It was contended that the company, having once treated the matter as a debt, and brought an action for the recovery of it, could not afterwards turn round and say it was not a debt. The case of *Davis v. Thomas*¹ was cited.

Mr. *Stewart* & Mr. *Biggs* appeared for the company; and Mr. *H. Clarke* appeared for Mary Dutton, but [they] were not heard.

The VICE-CHANCELLOR. The whole of the case proceeds on this, that the amount was recoverable on the policy. It appears to me that although there was a demand made for the premiums, that demand was annihilated by the refusal to pay. Nothing is shown in this case to make it appear that anything could be recovered on the policy. The bill must be dismissed, with costs.

Note. — The doctrine of waiver, in cases of breach of condition, has been a prolific source of litigation in the law of insurance; and the subject is not altogether free from difficulty. It is sometimes said, that a waiver is only binding when made either upon a valuable consideration, or when acted upon under circumstances which would constitute an estoppel by conduct; and it is said, in illustration of the point, that if a landlord agree (without consideration) that payment of rent may be made after it shall become due, and the tenant be thereby induced to omit payment at the time stipulated in the lease, the clause of forfeiture will be waived. *Mullin, J., in Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 164. But it is submitted that this is not accurate. In some cases, it is true, if a waiver be acted upon it will become binding; as in respect of the limitation clause, if the company should cause the insured (or his representatives) to delay suit by objections to the preliminary proofs, or by negotiations for a compromise continued under an agreement for delay. *Ripley v. Aetna Ins. Co., supra*; *Gooden v. Anoskeag Fire Ins. Co.* 20 N. H. 73. But in these cases the party is justified in acting upon the waiver. But he would not

¹ Russ. & M. 506; S. C. 9 Law J. Ch. 232.

Collett v. Morrison.

be excusable, as a prudent man, in delaying upon a simple promise not to insist upon the limitation clause. To act upon the waiver in such a way, it is believed, is not sufficient. See *Odiorne v. New England Mut. Mar. Ins. Co.* 101 Mass. 551; *Ketchum v. Protection Ins. Co.* 1 Allen (N. B.), 136; *Lampkin v. Western Assur. Co.* 13 Up. Can. Q. B. 237. It is worthy of note, too, that estoppel by conduct applies only to representations of a past or present state of facts. Bigelow, Estoppel, p. 481.

A binding waiver may sometimes be impossible by the nature or terms of the contract. The payment of the first premium is usually a condition precedent to liability; and it follows that payment or something tantamount must be made, and no waiver without consideration can make the company liable from the date of the policy. Or, the express language of the policy may prohibit any waiver; though in some cases the courts have gone to the verge of the law on this point. See *Miller v. Brooklyn Life Ins. Co.*, ante, vol. 2, p. 35; *Ib.* p. 737; *Walsh v. Aetna Life Ins. Co.* 30 Iowa, 133; *post*, p. 571. It is worthy of note, however, that where the policy merely provides that it shall become void in certain events, the courts have inclined to construe the term "void" as meaning "voidable." See 2 Bennett's Fire Ins. Cas. p. 137, note; *Armstrong v. Turquand*, *post*, p. 350.

Edge v. Duke, *supra*, comes under this last class of cases; as it was admitted by the vice-chancellor that if the plaintiff had paid the premium, the policy would have been revived, notwithstanding it was "actually void." *Quære*, would not this have been equally true if the company had enforced satisfaction against the insured?

COLLETT vs. MORRISON.

(9 Hare, 162. Coram Turner, V. C. 1851.)

Reform of policy.—If upon a proposal and agreement for a life insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy.

Trust.—The stat. 14 Geo. 3, c. 48, does not prohibit a policy of life insurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any way contravene the policy of the statute.

Estoppel.—An insurance company having had the chance of a contract of life insurance turning out in their favor, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it.

THE plaintiff, as the personal representative of Emma Collett, his deceased wife, brought his bill against the managing director of the Britannia Life Assurance Company, to recover £999 upon a policy of insurance effected with that company on the life of his said wife.

It appeared that on the 9th of September, 1844, W. J. Rich-

ardson (who also was a defendant to the bill) went to the office of the company, and stated that he wished to effect an insurance on the life of Mrs. Collett. Mrs. Collett was then, and had for some time been living separate from her husband, with an allowance from him for her separate maintenance. Richardson having been, on his application, furnished with one of the ordinary printed forms of proposal, filled it up, and handed it back to one of the company's officers. This printed form was headed "Proposal for Assurance," and contained, amongst others, the four following inquiries: 1. "Name, residence, and description of the party proposing the assurance." 2. "Name, residence and rank, profession or occupation of the party whose life is to be assured." 3. "If of sober and temperate habits." 4. "If now or ever afflicted with fits or any of the other enumerated disorders, or any other disorder tending to shorten life." The defendant Richardson answered these inquiries in the form which he then filled up: To the first, "Mrs. Emma Collett, of 8, Hans Place, Sloane Street, by her trustee, W. J. Richardson, 51, York Street, Portman Square." To the second, "The daughter of the late Sir Thomas Gage, Bart., and wife of John Collett, Esq." To the third, "Both." To the fourth, "Not that I know of." And Richardson signed the proposal. The usual inquiries having been made as to the health of Mrs. Collett, the proposal was, on the 16th of September, laid before the directors, who agreed to accept the life, and to insure it for the amount proposed. The usual notice having been given to Richardson that the life was accepted, and that the premium was to be paid within thirty days, he, on the 19th of September, again went to the company's office, and he then filled up and signed another of the ordinary printed forms of proposal, in which the answer to the first of the above questions was not as before, but was simply "W. J. Richardson, of 51, York Street, Portman Square, in the county of Middlesex, Esq."; and the answer to the fourth of the above questions, instead of "Not that I know of," was "No." The answers to the other questions were the same as in the former proposal. On this occasion Richardson paid £36 9s. 2d., being the first year's premium and the stamp duty on the policy, for which a receipt was given by one of the officers of the company in the following words: "Britannia Life Office, 1, Prince's Street, Bank, London, 19th September, 1844. Policy No. 5,194. Date, 9th Sep-

tember, 1844. Sum assured, £999. Premium, £34 9s. 2d. Sir, —I beg to acknowledge the receipt of £36 9s. 2d., being the first year's premium and stamp duty for an assurance of £999 effected by you with the Britannia Life Assurance Company on the life of Mrs. Emma Collett, the particulars of which will be expressed on a policy bearing the number and date abovementioned. Signed, James Brown, for Peter Morrison, Resident Director." The two proposals signed by Richardson were annexed together, and across the first proposal, signed on the 9th of September, was written "See proposal annexed." The first proposal was indorsed "Accepted, 16th September, 1844. Notice paid 19th." The like indorsement was made on the second proposal, with the addition of the words "Dated 9th." The second proposal, signed on the 19th of September, (although purporting by the indorsement to have been accepted on the 16th of September,) did not appear to have been laid before the directors. The policy was soon afterwards issued, and was in the following form: "Whereas W. J. Richardson, of, &c., Esquire, the person assured by this policy, hath agreed to effect an assurance with the Britannia Life Assurance Company, in the sum of £999, on the life of Emma Collett, of Hans Place, Sloane Street, in the said county of Middlesex, wife of John Collett, Esquire, M. P., for the whole continuance thereof, and hath caused to be delivered in the office of the said company a declaration, or statement in writing, signed by him the said assured, bearing date the 9th day of September, instant, declaring that the age of the said person on whose life the assurance is effected did not then exceed forty-six years; that she had had the small-pox or cow-pox; that she was not then and had not ever been affected with gout, asthma, hernia, fits, or spitting of blood; and that she was not afflicted with any disorder tending to shorten life; and that he the said assured agreed that such declaration or statement should be the basis of the contract between him and the said company: and whereas the said assured hath paid the sum of £34 9s. 2d., as a premium for twelve calendar months, commencing on the day of the date of this policy, the receipt whereof is hereby acknowledged, and the said assured hath agreed to pay the like premium at the expiration of every twelve calendar months during the life of the said person, on whose life the assurance is effected, as a consideration for the sum hereby assured: Now this policy witnesseth, that if the said per-

son on whose life the assurance is effected shall die previously to the expiration of twelve calendar months, to be computed from the day next before the day of the date of this policy, or in the event of her living beyond the said term, if the said assured or his assigns shall pay the premium of £34 9s. 2d. on or before the expiration of twelve calendar months, to be computed from the day of the date hereof, and at the expiration of every subsequent twelve calendar months during the life of the said person on whose life the assurance is effected, the funds or property of the company shall be subject and liable according to the company's deed of settlement, bearing date the 1st day of August, 1837, to satisfy and pay unto the said W. J. Richardson, his executors, administrators, appointees, or assigns, the sum of £999 within three calendar months next after satisfactory proof of the death of the said Emma Collett shall have been received at the office of the company: Provided always, that if anything averred by the assured in the declaration or statement hereinbefore mentioned, (except as to the age of the said person on whose life the assurance is effected, which is hereby admitted to have been proved to the satisfaction of the board of directors,) shall be untrue, this policy shall be absolutely void. Provided also, that this policy and the assurance hereby effected are and shall be subject to the conditions and regulations hereupon indorsed, so far as the same are and shall be applicable, in the same manner as if the same respectively were repeated and incorporated in this policy. In witness, &c." The only material condition or regulation indorsed upon the policy was the 4th: "That in every case where any policy issued by the company shall be, at the time of issuing the same, or shall at any time afterwards become, subject to any trusts whatsoever, the receipt of the trustee or trustees for the sum assured by such policy shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy or sum assured thereby, be an effectual discharge to the company and proprietors thereof." The policy when issued was sent from the office of the company to Mrs. Collett.

Mrs. Collett died in June, 1845. Upon her death Richardson set up a claim to the policy for his own benefit, and brought an action against the company to recover the sum assured, to which the company pleaded the general issue; that Richardson had no interest in the life assured, and that the policy was void for

Collett v. Morrison.

fraud and misrepresentation. The plaintiff thereupon filed a bill against Richardson, praying that he might be declared a trustee of the policy, and might be decreed to permit the plaintiff to use his name in giving discharges for the sum assured, and in proceeding at law upon the policy, and for an injunction to restrain the action in this suit, to which the company were not parties. An issue was directed to try the question, whether Richardson was a trustee of the policy; but the issue was not tried, the parties having agreed that a verdict should be found for the plaintiff, subject to a reference. The arbitrator made his award on the 7th of March, 1849, by which he found that the policy was effected by Richardson, as a trustee, and for the benefit of Mrs. Collett; that the verdict should stand, that no further proceedings should be taken in the suit, that Richardson was a trustee for the plaintiff, and that the plaintiff should be at liberty to use Richardson's name in giving receipts for payment of the money due on the policy, the plaintiff indemnifying Richardson; that Richardson should not proceed in his action against the company, or receive or release the money due on the policy, or do any act, or interfere in any manner to prevent the plaintiff from receiving such money.

In this state of circumstances the bill was filed. The bill stated, that the plaintiff was about to proceed at law for the recovery of the amount due on the policy; but that any action brought to recover the same must be brought in the name of Richardson, and would fail by reason of the claims and acts of Richardson fraudulently set up and done, and his fraudulent collusion with the company; that, as a defence to such action, the company intended to set up that Richardson did not effect the policy as trustee, but for his own benefit, and to plead that Richardson had no interest in such policy. The bill stated that Richardson had furnished the company with declarations and statements, and had concurred with them in acts which would, in an action in his name, be evidence that the policy was effected not as a trustee, but for his own benefit, and, although contrary to the real truth of the case, would enable the company to defeat the action; and it also charged that the company, as part of the case which they intended to set up at law, insisted that the proposal signed on the 19th of September was in substitution of the proposal signed on the 9th of September, and that the

policy was granted on the substituted proposal. The bill charged that the proposal of the 19th of September was antedated, and was signed by Richardson on that day, after the proposal of Emma Collett by Richardson, as her trustee, had been accepted; and that such second form of proposal was never even laid before the directors, and never was accepted by them, nor was any notice thereof ever communicated to Emma Collett; that, after accepting the proposal made on behalf of Emma Collett by her said trustee, it was against equity and good conscience for the company, dealing with Richardson as such trustee, to take from him a document such as the second proposal, so as to make evidence to the injury of Emma Collett, his *cestui que trust*. The bill set forth a letter from Richardson to the secretary of the company, dated the 13th of September, 1845, in which he asserted the policy to belong to him, and to have been effected by him for his own benefit; and charged that he had in other letters and statements, written and made to the officers of the company and others, repeated the same assertions, so as to furnish conclusive evidence to that effect in any action in his name on the policy; and that the company intended to avail themselves thereof in any action which the plaintiff might bring against them on the policy, for the purpose of founding their defence on the want of interest in Richardson, who, in truth, had no insurable interest in the life of Emma Collett.

The bill then charged, that, immediately after the award which determined that Richardson was a trustee of the policy, Richardson put himself in communication with the company, to assist them in defeating any claim of the plaintiff on the policy; and that the company and Richardson had concerted together how to get up evidence against the plaintiff's claim; and the bill set out certain letters of Richardson to the solicitors of the company, written for the purpose of pointing their attention to such evidence.

The bill then suggested that the company alleged they were not liable to pay anything to the plaintiff in respect of the policy, inasmuch as the same was not consistent in form with the provisions of the statute 14 Geo. 3, c. 48, whereby it is enacted, "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons'

name or names interested therein, or for whose use or benefit or on whose account such policy is so made or underwrote." The bill charged that the company insisted that upon the policy itself it must be taken to be a policy really effected by Richardson on his own account on the life of Emma Collett; and that, if the plaintiff should at law insist, according to the fact, that the same was made by Richardson for Emma Collett herself, and that it was a policy by herself on her own life, then the company would insist that, according to the provisions of the said statute, it ought to have been expressly stated in such policy that the same was effected for her use and benefit.

The bill charged, that it was well known to the company, at the time of effecting the assurance and preparing the policy, that Richardson had no such interest in the life of Emma Collett, and that the insurance was not made on the basis of or with reference to any such interest; that the circumstances of the policy having been framed so as not to express the real truth and nature of the transaction, and so as to make the transaction appear in contravention of the provisions of the statute, when in truth it was not, arose either from mistake, or, if not from mistake, then from actual fraud on the part of the company; of which mistake or fraud it was against equity and good conscience that they should now avail themselves; that there was, in fact, a perfect contract between the company and Emma Collett, by Richardson as her trustee, made and completed by such proposal and acceptance and payment of the premium; and that such contract did not, either in substance or form, contravene any statutory provision as to policies of insurance.

The bill prayed a declaration that the insurance was to be treated in equity as an insurance effected by Emma Collett, through Richardson as her trustee, for her separate use, on her own life; and that the plaintiff was entitled to have the policy rectified accordingly, or treated and considered as if so rectified; and that the company might be decreed to pay to the plaintiff the £999 with interest from the day of the death of Emma Collett; and that it might be declared that Richardson had been guilty of a fraudulent breach of trust in respect of the policy, and in collusion with the company; and that the company and Richardson might pay the costs of the suit.

The defendant, Morrison, on the part of the company, by his

answer to the bill, stated that the persons who, on behalf of the company, attended to the effecting of the insurance, were Brown, a clerk, and Nayler, the actuary of the company; that he had been informed and believed that the application for the insurance, on the 9th of September, was made by Richardson, on his own behalf; that it was, on behalf of the company, taken for granted that the proposal filled up by Richardson on the 9th of September, was filled up as being made by Richardson, simply in conformity to the wish he had expressed to effect an insurance on the life of Mrs. Collett; but that it was not at the time particularly noticed in what manner the form was filled up; that Nayler and Brown considered that the form of the proposal was objected to by one of them at a subsequent period, but that neither of them could speak positively on the point; that he could not recollect whether the directors or any of them looked into all the details of the proposal of Richardson, or the form in which it was made, but that it was not the custom of the directors to do so; and that it was their custom merely to consider the amount to be insured, the age of the person on whose life the policy was to be granted, and the opinion of their medical officer as to the life proposed; and that the directors agreed to accept Mrs. Collett's life, and to insure it for the amount proposed, believing the proposal to have been made by and for the benefit of a party really interested in the life, and to have been filled up in accordance with the practice of the company; that he believed that Mr. Brown, on the 19th of September, for the first time, observed on the proposal the words, "Mrs. Emma Collett, by her trustee, W. J. Richardson;" and that it was then that either Nayler, Brown, or Francis, the chief clerk of the company, stated to Richardson, as the fact was, that no policy could be granted of that nature, for that the company would not recognize or enter into any question of a trust, but could deal only with the person really to be insured, or words to that effect; and that Richardson thereupon represented, as he had before done, that he was himself the person to be insured; that he had been informed and believed that one of the said three officers of the company thereupon said that the proposal must be altered accordingly, and Brown then filled up, in his own writing, another form of proposal, which was then signed by Richardson; but the first of the said forms was the only one before the directors, although both were afterwards

indorsed as accepted. The defendant said he had been informed by Brown and Nayler, and he believed that they understood and considered, from the expressions of Richardson, that his object was to protect his own interest in the life of Emma Collett, and the defendant had been positively assured by Richardson that such was the fact; that although the said form of proposal was laid before the directors on the 16th of September, yet the same was so laid before them merely to consider whether the life was one which the company would accept, the amount to be assured, and the age of the person whose life was proposed, and not with reference to any other details in the proposal; that the policy was a proper policy for the only proposal which had been accepted by or on behalf of the company, namely, a proposal to insure Richardson against the death of Emma Collett; that all policies of the company of the nature of the one in question were made, and the policy in question was made, on the supposition of an interest in the person to be insured, who, in this case, was Richardson, although the company were not then accustomed to inquire, and did not inquire, into the nature or amount of such interest. And the answer insisted, that if it should appear (as the defendant and the company believed) that Richardson had no such interest in the life assured, the policy was for that reason void under the statute 14 Geo. 3, c. 48, and nothing was recoverable in respect thereof except the premium paid; and at all events nothing was recoverable in respect thereof by the plaintiff, if it should further appear (as the defendant and the company believed) that the premium was not paid out of the moneys of Emma Collett.

Nayler, Brown, and Francis were examined in the cause as witnesses on behalf of the company. It is not necessary to state the evidence further than that the conclusion of the court upon it was, that it fell far short of what was alleged by the answer; that there was no proof that the application for the insurance on the 9th of September was made by Richardson on his own behalf, or even that it was believed to be so; and that it was not proved that the directors did not examine into the details of the proposal; (which the witness Francis stated it was their practice to do;) and that the evidence failed to support the allegation of the answer as to what passed on the occasion of the second proposal.

The *Solicitor General* & Mr. W. M. James, for the plaintiff.

Mr. *Rolt* & Mr. *Cairns*, for the defendant Morrison, the managing director of the Insurance Company, relied upon the case raised by the answer. They contended that the first proposal was abandoned, and that the policy was founded upon the second proposal; that there was nothing in the fact of Richardson having at one time made a proposal as trustee, to prevent the company from afterwards contracting with him on his own account; and they contended moreover that the policy, not being under seal, might be sued upon at law in the name of the plaintiff; and that therefore the suit in equity was unnecessary and improper.

Mr. *Baily*, for Richardson, submitted that he should be treated as a trustee in respect of costs. The defendant had, it was true, claimed to be the owner of the policy; but that claim had been determined against him in another suit, and he had made no claim in this suit.

VICE-CHANCELLOR. The question first to be considered is, what is the course of the court in cases of this nature? And fortunately there is no difficulty upon this point, as there is direct authority upon it. In *Motteux v. The London Assurance Company*,¹ the insurance of a ship was made by the policy to commence from the time of her departure from Fort St. George, instead of commencing from the time she should arrive at Fort St. George, as according to the label of the agreement it ought to have been. Lord Hardwicke there says: "The label is the memorandum of the agreement, in which the material parts of the policy are inserted." "In the label the words are 'at and from.' This certainly includes the continuance at Fort St. George; and in the first part of the policy the voyage is described in the same manner; but in the latter, according to the constant form, it points out what shall be called the risk; and the adventure there is confined to the departure only from Fort St. George. It has been contended on the part of the plaintiffs, that it ought to be construed equally the same as if the words 'at and from' were actually inserted in this part of the policy. It is pretty difficult to reconcile the first part of the policy and the latter, but the label makes it very clear; for that considers the voyage and the risk as the same, and therefore it was only the mistake of the clerk, which ought to be rectified agreeably to the label."

¹ 1 Atk. 545.

This case appears to me fully to establish, that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the party assured, a court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy. Authority perhaps was not wanted upon the point, as it is the constant course of the court to rectify mistakes, and the decisions upon that subject would seem to govern the question; but it is satisfactory to find a case which in principle so nearly resembles the present.

Adopting, then, the principle of the case, and of the decisions to which I have referred, I have next to consider whether there was in this case an agreement to grant the policy to Richardson in trust for Mrs. Collett.

It is said on the part of the company that there was no such agreement. First, because the examination of the directors extended only to the age and the health of the party on whose life the insurance was proposed, and to the amount of the insurance; and secondly, because the approval of the directors was subject to its being afterwards found by the officers of the company that the proposal approved could be carried into effect consistently with its rules and regulations. But, with reference to the first of these grounds, one of the defendant's own witnesses states, that the directors, in considering proposals, looked to the names of the proposers; and another of their witnesses states, that it was impossible to have read the first proposal without seeing the words "Mrs. Emma Collett, by W. J. Richardson, Esq., her trustee;" and I cannot impute to these directors that they did not in this case look to a matter to which it was their habit to look, or that they overlooked what so clearly appeared on the face of the proposal; and with reference to the second ground, which is very loosely, if at all, alleged by the answer, I do not find that the evidence goes nearly so far, or at all shows that it was not the duty of the officers of this company to act upon any proposal approved by the directors, if it could in any way be carried out. Even supposing that the officers had a more extended power and could alter the substance of the agreement, and not merely the form of carrying it out, surely the agreement of the directors remained if the officers acted upon it, and meant to alter it in form only and not in substance.

It is to be seen therefore, what was the opinion of the officers of the company with reference to the proposal in question in this case. Did they or did they not take the second proposal, and prepare the policy in its present form, for the purpose of carrying out the first proposal? The evidence, I think, leaves no doubt upon this subject. The witnesses on the part of the company do not state that the policy was prepared with any different view; and indeed the point raised by the answer is, that there was no original contract, not that there was a substituted one. The original proposal is not cancelled, but it is annexed to the second proposal. The payment of the premium is indorsed upon it. The second proposal is not even submitted to the directors, by whom, and not by the officers, any contract binding upon the company would be to be made; and the policy when issued, is sent to Mrs. Collett. I am of opinion, therefore, that the directors must be held to have accepted the first proposal wholly, and not in part only; and that, at the time when this policy was issued, the agreement made with the directors by the acceptance of the first proposal remained in force — conclusions at which I arrive the more readily, from its appearing by the fourth condition, indorsed upon the policy, that it was contemplated that policies might be issued which were subject to trusts at the time of being granted.

It may be said, indeed, that taking the rules and regulations of the company and the provisions of the statute together, the agreement made upon the first proposal could not by any means have been carried out; and that the court, therefore, ought not now to act upon it; but, independently of what I have already observed as to policies in trust being contemplated, I think that the company, having had the chance of the agreement turning out in their favor, cannot be permitted to escape from it now that it has turned out against them.

With reference to the questions raised upon the statute, I do not think it necessary to enter into them. If the statute had prohibited any policy being granted to one person in trust for another, where both names appeared upon the face of the policy, or if the effecting such an assurance had in any manner contravened the policy of the statute, I might have felt myself bound to abstain from any interference; but I am of opinion that the statute has no such operation, and is directed to a wholly different object.

It was suggested, on the part of the company, that, the policy not being under seal, the plaintiff might bring an action upon it in his own name. I much doubt whether, under the circumstances of this case, such an action could be maintained; and, at all events, I think it would be attended with many difficulties; and the plaintiff having, in my opinion, a sufficient case in equity, I see no ground for exposing him to difficulties at law.

In dealing with this case I have abstained from entering into the question of fraud, as I do not believe that any actual fraud was intended; but, in having taken this course, I must not be understood to give any countenance to the notion that insurance companies, preparing and issuing policies under such circumstances as occur in the present case, would not be held liable in equity on the ground of fraud. The case of fraud is more strong for the interference of the court than the case of mistake. Lord Eldon, in *Ex parte Wright*,¹ refers to the distinction in cases where the duty of perfecting an instrument rests on the party who is to become liable under it; and the distinction is clearly well founded in principle, and I believe supported by authority.

I have abstained also from entering into the case of collusion; but I certainly must not be understood to express any favorable opinion of the conduct which has been pursued in this case, either by the defendants or by their legal advisers.

In the result, I am of opinion that an issue or issues must be directed upon the question as to the health of Mrs. Collett at the time when the first proposal was made.

TRISTON vs. HARDEY.

(14 Beav. 232. Coram Romilly, M. R. 1851.)

Title to policy. — Where A effects a policy in his own name upon the life of B, declaring he is interested in B's life, such policy, *primâ facie*, belongs to A, and the mere proof that some of the premiums were paid by B does not rebut that presumption.

SEVERAL questions arose in this case, which were argued at great length. The only one involving any point of law arose under the following circumstances: —

The plaintiff, Triston, and Sebastian Hardey, deceased, were

¹ 19 Ves. 257.

in partnership as solicitors in London, and the defendant, James Hardey, (the brother of Sebastian Hardey,) who was resident in Dublin, had various transactions with that firm, which it is unnecessary to detail.

On the 23d of September, 1840, James Hardey effected a policy of assurance on the life of Sebastian Hardey, his brother, for the sum of £2,000; and the policy recited, that James Hardey had deposited a declaration, dated the 8th of September last, setting forth the age of Sebastian Hardey, &c., &c., "and that the said James Hardey hath an interest in the life of the said Sebastian Hardey to the extent of that assurance." The policy certifies, that James Hardey, his heirs, executors, or assignees, should be entitled to receive out of the stock and funds of the society, at the end of six months after the decease of the said Sebastian Hardey, the sum of £2,000 sterling.

The court, for the purpose of the judgment, assumed it to be proved that the first three premiums had been paid by Sebastian, and it is therefore unnecessary to refer to the evidence of the fact.

Sebastian Hardey died in June, 1847, and James Hardey became his administrator. The plaintiff in this suit insisted, that the policy effected by James Hardey, in the name of Sebastian, was the property of Sebastian, and not of the defendant James.

Mr. *Walpole*, Mr. *Goodeve* & Mr. *C. J. Foster*, for the plaintiff.

Mr. *Roupell*, Mr. *Cotton*, Mr. *Lloyd* & Mr. *Jervis*, for the defendants.

Mr. *Walpole*, in reply.

The MASTER OF THE ROLLS (after referring to the other points) said: I will next consider whether the policy was the property of Sebastian Hardey, or of his brother James. It is very important to observe the circumstances affecting the transaction. The policy was effected in the form usual where one person insures the life of another, claiming an interest in such life. In the absence of any evidence, I should assume that the policy was the property of the person who appeared to have effected it, and that the allegation of his having an interest to the extent of that policy was a sufficient allegation. The evidence relied on by the plaintiff, upon whom the burden of proof of establishing that Sebastian was the owner of the policy lies, may, I think, be

stated thus: First, he relies upon the fact that the first premium on the policy was paid by Sebastian, and for that purpose he produces an exhibit marked "A. O.," which is a check by Triston & Hardey upon Messrs. Coutts for the amount of the premium on the policy, and a check block book, containing an account showing that this was payment for an insurance effected in the Scottish Widows' Fund Office, and was marked "private," as being a sum advanced by Sebastian himself. He next relies upon two entries, showing that the next two premiums on the policy were also paid by Sebastian. He proves that, by entries in certain accounts, which were delivered to the plaintiff on behalf of James. He then contends, that if he establishes that these premiums were paid by Sebastian, James must be held to be a trustee for Sebastian, in analogy to a principle established in cases where the purchase money for an estate is paid by one person and the conveyance taken in the name of another, in which case the latter is held to be a trustee for the former.

In the first place, (assuming, as I do for the present, that these premiums were paid by Sebastian out of his own money,) I do not think that the analogy applies to a case of this description. If a man buys an estate for a sum of money to be paid down, it is very material, for the purpose of ascertaining the owner of the property, to see who paid the consideration money; but if the estate be purchased for an annual annuity, the same principle does not apply until you ascertain by whom the whole annuity has been paid.

The presumption arising from the payment of the consideration money is liable to be rebutted by a great number of circumstances. The money might have been lent for the purpose of enabling the party to effect the purchase. Here there were various dealings and transactions between the parties, and it would seem to be a strong matter to make the ownership of an estate depend, either upon what might turn out to be the result of taking some complicated accounts, or upon certain items of payment in the account, and which might possibly turn out to have been made by one person on behalf of the other. In order to have enabled me, in this case, to ascertain the due weight to be attached to these particular items, it would, undoubtedly, have been of great importance for me to have known the state of the account between James and the firm, when this policy was

effected; for if it be true, as is alleged, that Sebastian owed James a considerable sum of money, it would not seem an unreasonable thing for James to effect a policy upon his brother's life, for the purpose of making a good security. I have nothing to guide me with respect to these accounts; but, assuming it to be proved, as I do, that the payment of the first and the two subsequent premiums was made by Sebastian or his firm out of his proper moneys, I do not think that that is sufficient to enable me to come to the conclusion, that the policy belonged to Sebastian, or to rebut that which appears to be established *prima facie* by the form and declaration upon the face of the policy.

See *Burridge v. Row*, ante, p. 28; *Gottlieb v. Cranch*, *infra*.

GOTTLIEB vs. CRANCH.

(4 De G., M. & G. 440. Chancery: coram Lords Justices, 1853.)

Policy effected by creditor. Payment of debt.—A money lender agreed to advance a sum at 8 per cent. per annum, and the premiums on the insurance of the borrower's life. The borrower executed a bond with sureties, conditioned for payment of an annuity during his life equal to the above aggregate sums, and any increase in premiums by reason of the grantor being abroad; and the condition also provided for the cesser of the annuity on notice and payment of the original sum advanced, and all arrears of the annuity up to that time, but said nothing as to the policy. *Held*, that, on redemption, the borrower had no equity to have the policy delivered to him.

THIS was an appeal from a decree of Vice-Chancellor Stuart, directing the grantee of an annuity which had been redeemed to deliver up a policy of assurance, effected by him on the grantor's life.

The treaty for the grant of the annuity commenced in November, 1821; when the plaintiff, having occasion for the sum of £200, answered an advertisement inserted by one Mr. Burt, in a provincial newspaper, and desired to know on what terms Mr. Burt would make the required advance.

Mr. Burt replied by letter, dated the 23d of November, 1821, as follows: "The terms of loan are 8 per cent., besides insurance of the life; one or two guarantees also of undeniable responsibility and character will be required; I should like a reply at your earliest convenience, as in the hope of your negotiation being final, I have discontinued the advertisement."

The terms were acceded to, and some delay having taken place in completing the transaction, the plaintiff wrote to Mr. Burt, who, it appeared, acted in the transaction as the agent of a Mr. John Pollard Davey, and in answer received from Mr. Burt the following letter, dated the 3d January, 1822: "My dear Sir, — When your messenger called at my office yesterday, I was too much engaged to reply to your favor, and without reference to Mr. Davey, I hardly know what answer to give, as everything now seems to depend on him. The settlement of the business would be, I think, much facilitated by your seeing Mr. Davey, either at his house or abroad, when you can fix the day next week, let it be either Thursday or Friday, when you and he and the guarantees can attend, informing me of the same; previous to which attendance, Mr. Davey should wait on Messrs. East-lakes, and desire them to order the policy, and have it dated on the same day, whether Thursday or Friday, as the business is settled, because, until the money is advanced, no interest in your life arises on the part of his son, who is the lender of the money, and who must be the insurer of your life."

In pursuance of this letter the plaintiff had an interview with Mr. Davey, the father of John Pollard Davey, and a policy of insurance on the plaintiff's life was ordered, and the 10th of January was appointed to complete the transaction.

The amount of premium required for insuring the plaintiff's life in the European Office in the sum of £200, was £5 9s. 2d., which it was stipulated and agreed that the plaintiff should pay, in addition to the interest on the sum of £200, at the rate of 8 per cent. per annum.

On the 10th of January, 1822, the transaction was completed; Mr. Burt, as the agent of John Pollard Davey, advancing to the plaintiff the £200, and the plaintiff and three sureties, William Hayne Grylls, John Crouch Grylls, and Edward Jorey, executing a bond dated the 10th of January, 1822; whereby the plaintiff, and William Hayne Grylls, John Crouch Grylls, and Edward Jorey became jointly and severally bound to John Pollard Davey in the penal sum of £400, with a condition for making the same void on payment by the plaintiff, and William Hayne Grylls, John Crouch Grylls, and Edward Jorey, their heirs, executors, or administrators, or some or one of them, to John Pollard Davey, his executors, administrators, or assigns, during the plaintiff's life, an annu-

ity of £21 9s. 2d., by quarterly portions, on the several days therein mentioned, during the continuance of the annuity, or in the space of twenty-one days at farthest, after each of the said days, without any deduction or abatement whatsoever, with a proportionate part of such annuity in case the plaintiff should die on any other day than one of the quarterly days of payment, from the time which the plaintiff had lived of the then current quarter of a year, and on payment in like manner to John Pollard Davey, his executors, administrators, or assigns, of all additional premiums of insurance occasioned to, or paid by him or them, in consequence of the plaintiff being ordered abroad on foreign service, or otherwise absents himself from this kingdom; or, in case at or after the expiration of two years from the date of the bond, the plaintiff, and William Hayne Grylls, John Crouch Grylls, and Edward Jorey, or either of them, their or either of their heirs, executors, or administrators, should be desirous of redeeming the annuity or yearly sum of £21 9s. 2d., and of such their or either of their intention should give six calendar months' notice in writing, under their or either of their hands, unto John Pollard Davey, his executors, administrators, or assigns, — that then and in that case on payment unto John Pollard Davey, his executors, administrators, or assigns, at the expiration of such notice as aforesaid, or of any other similar notice which might be afterwards given, of the sum of £200, being the original purchase money of the annuity, and all arrears of the same, together with the costs, damages, charges, additional premium, or additional premiums of insurance, and all other expenses whatsoever, at any time or times incurred or sustained by John Pollard Davey, his executors, administrators, or assigns, with relation to the annuity up to and inclusive of the day of redeeming the same.

Simultaneously with the bond the plaintiff and the same sureties executed a warrant of attorney of the same date, to enter up judgment for £400, with costs of suit, subject to a defeasance in similar terms to those of the condition of the bond.

On the same day an insurance was effected on the life of the plaintiff in the European Life Insurance Company for the amount of the loan, dated the same 10th of January, 1822, and thereby, in consideration of the yearly sum of £5 9s. 2d., to be paid to the company, the funds and property of the company were made subject and liable to pay and satisfy, within six calendar months

after the due proof should be received of the death of the plaintiff, unto John Pollard Davey, his executors, administrators, or assigns, the sum of £200, and such further sum or sums as should, under the regulations of the company, be appropriated as a bonus to the policy.

By an indenture dated the 22d of September, 1849, in consideration of £185, the annuity, and all arrears thereof, and also the bond, warrant of attorney, and policy of insurance, were assigned to the defendant, Elizabeth Cranch, her executors, administrators, and assigns, for her and their own absolute use.

On the 22d of April, 1852, the plaintiff, in pursuance of a notice given according to the terms of the bond, paid to Elizabeth Cranch the sum of £200 for the repurchase of the annuity, and at the same time paid up all the arrears, and thereupon demanded the delivery of the bond, warrant of attorney, and policy of assurance. The solicitor of Mrs. Cranch delivered up to the solicitor of the plaintiff the bond and warrant of attorney, but refused to deliver up the policy.

The plaintiff then filed the present bill, charging that Elizabeth Cranch was in equity a mere trustee of the policy for the plaintiff; and praying that it might be declared that the plaintiff was entitled in equity to the policy, and to the money to arise therefrom; and that the defendant, Elizabeth Cranch, might be decreed to assign and deliver the said policy of assurance to the plaintiff free from all incumbrances created thereon by the defendant; and that the defendant might be ordered to pay the costs of the suit.

Mr. *Chandless* & Mr. *Speed*, for the plaintiff. By the very terms of the original arrangement, the transaction was a loan of £200 at 8 per cent. The grantor paid the premiums on the policy, and became entitled to it when the loan was paid off. The stipulation as to paying additional premiums of itself was sufficient to show the true nature of the contract.

They referred to *Phillips v. Eastwood*; ¹ *Ex parte Andrews*; ² *Holland v. Smith*; ³ *Humphrey v. Arabin*; ⁴ *Williams v. Atkyns*; ⁵ *Godsall v. Boldero*.⁶

¹ Ll. & G. temp. Sug. 289.

² 2 Rose, 410.

³ *Ante*, p. 2.

⁴ Ll. & G. temp. Plunket, 318.

⁵ 2 Jo. & Lat. 603; see also *Ex parte Varnish*, 1 Mont., D. & De G. 514.

⁶ 9 East, 72; 2 Smith's Leading Cases, p. 157; but see *Dalby v. India Assurance Company*, *ante*, vol. 2, p. 371.

Mr. *Giffard*, for the defendant, was not called upon.

The Lord Justice KNIGHT BRUCE. The mere circumstance that a purchaser of an annuity insures the life on which the annuity depends does, of course, not give to the person or estate that pays the annuity an interest in the policy. In that simple state of things the policy belongs merely to the person who has chosen to effect it for his own protection or advantage. It generally, or often, happens that when an annuity is purchased, the amount of the annuity, or the price to be given, is fixed on the principle of obtaining for the purchaser a certain amount per cent. for his purchase money, and enough also to insure on the ordinary terms the life on which the annuity depends. If there is no more in the case, the rights of the purchaser remain exactly as they would have done if the price or amount had been calculated without reference to any such considerations. So also, it is not an uncommon thing, when the price or amount of the annuity has been fixed with reference to such considerations, to provide that if the person on whose life the annuity depends shall go to India, or, in case of a man, shall enter into the military service, by which the expense of insurance is increased, the amount of the difference shall be paid by way of addition to the annuity, because that changes the calculation, or (I should rather say) adds a new element to those upon which the calculation generally proceeds. And if there is nothing more in the matter than that common ingredient in the transaction, this also does not vary the case, because in each of those states of circumstances it is at the option of the purchaser of the annuity whether he will insure or not; whether he will make a contract with an insurance office, or become his own insurer. Nor does it make a difference, though there shall be a covenant that the person on whose life the annuity depends shall, on a reasonable request, attend at an insurance office, in order that the medical officer there may examine the life, and see whether the insurance is one fit to be taken. That also is common. There may be particular circumstances of contract, or there may be representations, express or to be inferred, that may change the nature of the case. I have looked in vain for any such circumstance here. I find nothing but a plain declaration of the principle on which the calculation proceeded, and which is more or less involved in every one of these annuity transactions, whether mentioned or not; but the purchaser of the annuity still remained

at liberty either to drop or keep up the policy. The grantor could not complain, whether he did or did not keep it up. The purchaser might have been his own insurer, at his own choice, for his own benefit, and at his own risk.

Therefore I do not see any ingredient in the present case upon which it can be brought within the authorities cited. The plaintiff's counsel has made the most of his material, but has not been able to convince me that there is anything in his cause but substantially the ordinary and simple transaction that I have mentioned, in which the policy belongs to the purchaser of the annuity, as I think this does.

The Lord Justice TURNER. As a general rule it is not disputed, that where the grantee of an annuity insures the life of the grantor, the policy effected belongs to the grantee. The question here is, whether there are any special circumstances to take this case out of the general rule. Was there any contract between these parties that the policy, on the redemption of the annuity, should belong to the grantor? for the case, no doubt, might be affected by such a contract. I see no evidence of any such contract. The first letter which passed between the parties refers indeed to its being necessary to provide for the insurance of the grantor's life; but it is evident that that letter was meant only to state the terms on which the money would be lent. It amounts to no more than a statement of the calculation which the grantee had made as the foundation of the terms on which he would advance his money. The same observation applies to the second letter. So far as the letters are concerned, there is a total absence of contract between the parties as to the property in the policy. Then comes the stipulation in the bond, that if the grantor shall go abroad, the extraordinary premiums occasioned thereby shall be paid by the grantor. That provision, however, imposes no obligation on the grantee to keep the policy on foot. It means this, that he may keep up the insurance, taking the amount payable at the office as the measure of the risk he runs. There being then no contract between the parties, nor, so far as I can see, no other special circumstances affecting the question, how does the case stand upon principle? The money which the grantee receives becomes the grantee's own money. He receives 8 per cent. on his loan, and, besides that, an annual sum, which he applies in keeping on foot the policy. The money so applied is not the grantor's

Lea v. Hinton.

money, but the grantee's, and what equity is there for the grantor to have the benefit of the application of the money of the grantee? I think that there is no foundation whatever for this bill. It must be dismissed with costs, but there will be no costs of the appeal.

Note.—This subject has since come under further consideration; and for convenience the cases are given here.

LEA vs. HINTON.

(5 De Gex, M. & G. 823. Chancery: coram Lords Justices, 1854.)

Insurance on debtor's life.—One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money: *Held*, that to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt.

THIS was an appeal from a decision of the master of the rolls on an adjourned summons, in an administration suit, which came on to be heard with the cause on further directions. The principal question was, whether the defendant, who was the executor of the testator in the cause, ought to be debited with £300, received by him in respect of a policy which he had effected in November, 1848, on the testator's life. The case is reported below in the 19th volume of Mr. Beavan's Reports,¹ where the facts are stated.

The *viva voce* examination which took place below had not been taken down, and application was made to their lordships for a *viva voce* examination before themselves, but it was arranged that the case should be argued in the first instance on the evidence before the court. On this evidence it appeared that the defendant was, on many occasions, the solicitor of the testator, and on very intimate terms with him, and that the testator was engaged to be married to the defendant's daughter. It also appeared that the defendant had joined the testator as his surety in a promissory note for £300 to a Mr. Bevan. The defendant claimed to be a creditor of the testator, but this was disputed, the testator having taken a son of the defendant's as apprentice to him, at a premium, in his profession of surgeon and apothecary, and having attended professionally members of the defendant's family; and there being a conflict of testimony as to the understanding respecting these attendances, as well as on other facts connected with the accounts between the testator and the defendant. The defendant stated upon his deposition, that he was the agent to the office in which the insurance was effected; that different forms of proposals were used when a party insured his own life, and when a third party insured a life, but that the same printed form was applicable to all cases, only filled up in a different manner; that his recollection was not distinct on the matter, but that his impression was, that the policy was effected by him for money owed by the testator to him; that the testator never gave him instructions to insure his (the testator's) life, but that the testator signed the proposal for insurance, which was necessary, whether a person was insuring his own life, or

Lea v. Hinton.

another was insuring it. That the premium was paid by way of debit in the defendant's account with the insurance company, and that there was no other entry of the premium on this insurance except in the defendant's account book with the insurance office; that the £300 was advanced by Bevan on the 21st of October, 1848, but the defendant could not say whether he had lent Mr. Lea any money in that month, and that the proposal for insuring the testator's life was in the handwriting of the defendant and his son. The defendant said he could not swear that the insurance was not for £300 advanced by Mr. Bevan. He admitted that he had received the £300 secured by the policy from the insurance office, and had paid the debt to Mr. Bevan out of the testator's estate.

The plaintiff, who was a sister of the testator, deposed that she lived and resided with the testator, and kept house for him from the month of June, 1847, until the time of his death, which took place on the 17th of March, 1849, and that he spoke to her on two or three occasions shortly before his death respecting his affairs; and told her on his death-bed that he had insured his life for £300, and that the papers, together with his will, were in the defendant's possession; and that he also told her that the defendant had sold his (the testator's) practice and furniture, and that there would be quite sufficient to repay the plaintiff the £200 she had lent to him, and that after his debts were paid, there would be something considerable to be divided between the plaintiff and her sister.

Mr. Roupell & Mr. Bagshawe, for the appellant. The policy was effected by the defendant, who, in effect, has paid all the premiums. No contract is shown to have existed between him and the testator, binding the defendant to effect or keep on foot the policy. The testator cannot therefore be said to have had any interest in the policy. Whether the defendant had an interest or not was a matter with which the testator's estate had no concern. It is a matter between the defendant and the office. But it is clear that the defendant, who was constantly in advance to the testator, had sufficient interest to enable him to effect a valid policy.

Mr. R. Palmer & Mr. J. H. Palmer, for the respondent. The policy was effected, it is clear, with the privity of the testator, and for the purpose of indemnifying the defendant in respect of the joint note. The proceeds must be therefore applied according to that arrangement.

Mr. Roupell, in reply.

The Lord Justice KNIGHT BRUCE. We propose at the present moment to decide but one question in the case; namely, whether the sum of £300 received after Mr. Lea's death by Mr. Hinton from the insurance office ought to be debited to him as the executor of Mr. Lea, in account with that gentleman's estate.

If the insurance in dispute was effected by Mr. Hinton, as the agent or trustee of Mr. Lea, it is of course that the question must be decided in favor of Mr. Lea's estate. But if the insurance was not so effected, then I think that the facts before the court render inevitable the conclusion that Mr. Hinton effected it for the purpose of protecting and indemnifying himself as a surety or creditor, or as a surety and creditor of Mr. Lea, in whose life Mr. Hinton does not appear to have had an interest in any other sense. Nor can he be

Drysedale v. Piggott.

heard to say, that he received the money which he did receive from the office for any other purpose, denying as he does that he effected the policy on the account and for the benefit of Mr. Lea. Now, upon the materials before us, it is impossible to say that the whole of this sum was required for the protection or indemnity of Mr. Hinton as surety or creditor, or in both capacities, exclusively of the £300 due to Mr. Bevan, or that it was not the duty of Mr. Hinton, sustaining the united characters of Mr. Lea's executor, of surety for him as to that debt, and of the assured in the policy, who had received the money upon the policy, to apply in or towards discharging the debt to Mr. Bevan, if not the whole of the insurance money, at least so much of it as was not required for protecting or indemnifying Mr. Hinton as surety or creditor, or surety and creditor otherwise. But as executor he has debited Mr. Lea's estate with the whole of the £300 due to Mr. Bevan, which sum was paid after the receipt of the insurance money; a state of circumstances removing all doubt, if doubt could otherwise have been entertained as to debiting Mr. Hinton with the insurance money, whether he effected or did not effect the policy as Mr. Lea's agent, or as a trustee for that gentleman. What I have said leaves (I repeat) untouched the question whether Mr. Hinton ought to be credited with any amount with which he is not at present credited.

The Lord Justice TURNER concurred.

DRYSDALE vs. PIGGOTT.

(8 De G., M. & G. 546. Chancery: coram Lords Justices, 1856.)

Insurance by creditor. Abandonment. — A debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life in the creditor's name, as a collateral security. The policy was effected, but after a time neither the debtor nor his surety paid the premiums on the policy, though required to do so by the creditor, who paid them himself: *Held*, on the death of the debtor, that he and his surety had not abandoned the policy, but that it was redeemable by the surety on repayment of the premiums paid by the debtor.

THIS was an appeal from the decision of the master of the rolls dismissing the bill of the plaintiff Stoddart Drysdale, whereby he sought a declaration that the defendant Frederick Piggott might be declared a trustee for him of a policy of assurance effected on the life of the plaintiff's son Pattison Drysdale, since deceased, and prayed for consequential relief.

In January, 1851, the plaintiff's son Pattison Drysdale was indebted to Frederick Piggott, the defendant, in a sum of £350 11s. 6d. for upholstery supplied to the plaintiff's son by the defendant.

After some applications by the defendant's attorney to the plaintiff's son, an agreement was come to between the plaintiff and the defendant that some articles of upholstery, in respect of which the demand arose, should be taken back by the defendant on his being allowed £20 per cent. on the amount charged by him for the same, in part satisfaction of his claim, and that an insurance should be effected in the name of the defendant on the life of the plaintiff's son, for the purpose of securing the balance coming to the defendant in respect of his claim and law expenses, and the amount, if any, which he might (in case of the plaintiff's son making default in payment of the pre-

Drysdale v. Piggott.

miums) pay for keeping the policy on foot, and it was further agreed, that the aggregate amount of the balance, law expenses, and £4 8s. as the first year's premium in respect of the assurance, and interest on such aggregate amount at the rate of £5 per cent. per annum, should be payable by nine instalments quarterly, except the first instalment, which it was stipulated should be paid in the month of March, 1851, and that a bond should be executed by the plaintiff's son and the plaintiff as his surety for securing the above amount and interest.

The following account was then agreed upon :—

	£	s.	d.	£	d.	s.
Account rendered	355	11	6			
	201	2	6			
	<hr/>					
				154	9	0
				2	10	0
				4	8	0
				0	0	0
				9	11	0
				<hr/>		
				£170	18	0

A bond to secure this amount was at the same time executed by the father and son. It was dated the 10th of February, 1851. It recited that the son was indebted to the defendant in the sum of £170 18s. for goods sold and delivered to the son at the son's request, and also for money paid, laid out, and expended by the defendant for the use and at the request of the son. It then recited that the son, being unable to pay the sum of £170 18s., had applied to and requested the defendant to accept payment of the debt of £170 18s. with interest thereon at £5 per cent. per annum, by the instalments and in manner thereafter mentioned, which the defendant had agreed to do upon having the repayment thereof, with interest as aforesaid, secured by the joint and several bond of the plaintiff's son and of the plaintiff; and that the plaintiff had agreed to join with his son in the bond, subject to the condition thereunder written, as surety for his son. The condition of the bond was expressed to be, that if the plaintiff's son, his heirs, executors, or administrators, should pay or cause to be paid unto the defendant the full sum of £170 18s., with interest for the same, on the days and in manner therein mentioned, the bond should be void.

Shortly after the date and execution of the bond the defendant effected an insurance in his own name in the Pelican Life Assurance Company on the life of the son for £200, subject to the payment of the annual premium of £3 18s. 4d., and the first year's premium was paid by the defendant and was included as above mentioned in the sum secured by the bond.

The son paid the second year's premium. Neither the plaintiff's son nor the plaintiff paid any further premium, and the third year's premium was paid by the defendant, who applied to the plaintiff and requested him to repay the amount of the premium which the defendant had thus paid in respect of the policy of assurance, but the plaintiff objected to pay the amount, considering,

Drysdale v. Piggott.

as he stated, that it was the duty of his son, or in case of his not doing so, of the defendant, to keep the policy on foot.

The son paid the first seven instalments due upon the bond, amounting together to £140, and the plaintiff, as surety, subsequently paid the last two instalments, amounting to £40 4s. 5d. The last payment was made on the 20th of September, 1853.

In January, 1854, the son died intestate, having gone abroad without notice to the insurance office, and having been lost in a steam-vessel which was wrecked off the coast of Ireland, and the plaintiff was his administrator.

The defendant required the Pelican Life Assurance Company to pay him the £200. £197 18s. was accordingly paid to him by the company, a deduction of £2 2s. having been made on account of extra premiums.

The bill prayed that it might be declared that the plaintiff, as surety for his son, was entitled to the benefit of the policy, and was entitled to be paid the sum of £40 4s. 5d. which he so paid to the defendant as aforesaid, and interest thereon at the rate of £5 per cent. from the time when he paid the said sum; that the defendant might be accordingly decreed to pay to the plaintiff the sum of £40 4s. 5d. and interest, he being willing that the sum of money (if any) which the defendant might have paid in respect of the premiums of assurance on the policy beyond the amount included in the bond and interest thereon might be retained by the defendant out of the sum received by him on the policy, and that the defendant might be decreed to pay the residue of that sum remaining in his hands to the plaintiff as the personal representative of his son.

Mr. Roundell Palmer & Mr. Tripp, in support of the appeal. The policy belonged in the first instance in equity to the plaintiff's son, as he was charged with the first premium. Nothing took place afterwards to divest the property out of him. The debt for which it was a security having been paid in full, the defendant is a trustee of the insurance moneys for the plaintiff as his son's representative or as surety, subject to the defendant's lien for the premiums paid by him.

They referred to *West v. Reid*, 2 Hare, 249; *Morland v. Isaacs*, 20 Beav. 389; *Ex parte Andrews*, 1 Madd. 573; *Brown v. Freeman*, 4 De G. & Sm. 444; *Lea v. Hinton*, 19 Beav. 324; 5 De G., M. & G. 823; *ante*, p. 88; *Hart v. Clarke*, 6 De G., M. & G. 232; *S. C.*, on appeal, 6 H. of L. Ca. 663; *Clack v. Holland*, 19 Beav. 262; *Robertson v. St. John*, 2 Bro. C. C. 140.

Mr. Selwyn & Mr. Wichens, for the defendant. The policy by the agreement was to be for one year only. The defendant, by keeping it on foot afterwards, made it his own. The plaintiff and his son, by declining to pay the premiums, must be taken to have repudiated and abandoned or elected to waive the benefit of it. The son made default in payment of the premiums, and violated the rules of the office by going abroad without notice, so that if the policy had stood in his name it would have been forfeited.

They referred to *Dalby v. India and London Life Assurance Company*, 15 C. B. 365; *ante*, vol. 2, p. 371; *Gottlieb v. Cranch*, 4 De G., M. & G. 440; *ante*, p. 82; and see *Myers v. United Guarantee Society*, 7 De G., M. & G. 112; and *Fremer v. Brade*, 2 De G. & J. 582; *post*, p. 182.

Mr. Roundell Palmer, in reply.

The Lord Justice KNIGHT BRUCE. In this case Pattison Drysdale had been indebted to the defendant, and his father the present plaintiff had become surety for his son, to secure the payment of the debt by instalments. As a part of this transaction, a policy had been effected in the name of the creditor on the life of the principal debtor, the expenses of effecting which, or a large part of them, had been charged to the principal debtor, and included in the sum for which his father became surety. It was properly conceded on the part of the defendant that in these circumstances the policy originally belonged to the father and son, or one of them, subject to the right of the creditor to apply the money assured by it in payment of his debt, if necessary. Subsequently another premium became due, after a part but not the whole of the debt had been paid, and then upon the creditor applying to the father to pay the premium the father refused to do so, and thereby, so far as he was concerned, exposed the property to total destruction. I will assume in favor of the defendant that this refusal was the refusal of the son as well as of the father. Upon this refusal the creditor might have left the property to destruction; he did not do so, but chose to preserve it, which preservation must enure to the benefit of the father and son. It has been ably argued for the defendant that the refusal to pay the premium was a repudiation of the policy—a giving up to the creditor of all the equitable title of the father and son to it. I think, however, that the conduct of the parties is not to be treated as having such an effect. If a creditor chooses to preserve a pledge, he preserves it for the benefit of the owners, subject to his lien for the debt and for the expenses incurred in preserving the pledge. The plaintiff therefore is entitled to the money assured by the policy on repaying to the defendant his advances, with interest. There will be no costs at the rolls or of the appeal, the merits on each side being very small.

The Lord Justice TURNER. The first point made for the defendant was that the contract was to insure the life only for one year, but the policy produced is one for the whole life of the principal debtor, and the creditor after that cannot be heard to allege that the contract was as he stated. Then what was the position of the creditor? He was mortgagee of a policy, and there was nothing to bar the right of redemption but the fact that the debtor, when applied to for payment of the premium necessary to keep the policy on foot, refused to pay it. It was quite open to the creditor to proceed to a foreclosure in the regular way, but he has not done so; and in my opinion it would be a most dangerous thing to hold that the mere non-payment by a mortgagor of a charge attributable to the mortgaged property is to have the effect of a foreclosure. The decisions of this court in *Nicholson v. Whalley*¹ and *Hart v. Clarke*² are against such a view; and there must, in the present case, be a decree for the restoration of the moneys received under the policy, after deducting the defendant's advances, with interest at £5 per cent.

The Lord Justice KNIGHT BRUCE. I wish it to be fully understood that I adhere to the decisions in *Gottlieb v. Cranch*³ and *Lea v. Hinton*.⁴

¹ Before the lords justices, April 28, 1855. This case turned on such minute details, that it was not considered useful to report it.

² 6 De G., M. & G. 232.

³ 4 De G., M. & G. 440, *supra*.

⁴ 5 De G., M. & G. 823, *supra*.

Courtenay v. Wright.

COURTENAY vs. WRIGHT.

(2 Giff. 337. Coram Stuart, V. C. 1860.)

Policy effected by creditor. Debt paid. Annuity.—Where the relation of debtor and creditor subsists, and a policy of assurance is effected by the creditor, directly or indirectly, at the expense of the debtor, under circumstances which show that it was intended as a security or indemnity to the creditor, he is bound, on payment of the debt, to deliver up the policy of assurance.

The same principle applies to the case of a life annuity, and accordingly where the grantor came to redeem and repay the principal money, and have the judgment debt due to the grantee satisfied, and the securities delivered up, the grantee was decreed on payment to deliver up the policy of assurance.

THE original bill in this case was filed on the 11th of September, 1847, against Charles Wright, to redeem an annuity.

The bill averred that, in the year 1824, C. B. Courtenay, the late husband of the plaintiff, being desirous of borrowing the sum of £1,000, on the treaty for the said loan, it was agreed between C. B. Courtenay and C. Wright that Wright should receive interest on the said sum of £1,000 at 7 per cent., and should effect an insurance on the life of the plaintiff, and that payment of the interest on the loan and of the premiums on the policy should be secured by a warrant of attorney of Courtenay and one Bolton, and by an assignment of certain premises in Long Acre, to which the plaintiff was entitled to her separate use, with remainder to her children by the said Courtenay.

The following allegation was introduced by amendment:—

That the plaintiff inquired of her solicitor, Mr. Harvey, who was also the solicitor of Wright, what assurance office she should go to, when he replied, that she might please herself, as in the event of the redemption of the annuity, the policy and any bonuses declared upon it would be her property.

The bill alleged that, in order to carry the arrangement into effect, an indenture was made between C. B. Courtenay and the petitioner of the first part, one Bolton, since deceased, of the second part, Charles Wright of the third part, and E. Burnham of the fourth part, whereby—after reciting, among other things, an indenture of lease and an indenture of appointment and release, bearing date respectively, the lease the day next before the day of the date of the appointment and release, and the appointment and release bearing date on or about the 8th day of April, 1813, and made or expressed to be made between the said C. B. Courtenay of the one part, William Cooke, Esq., of the second part, and Thomas Stinson and the said Cowling Bolton of the third part, and grounded so far as the same operated by way of appointment and release, on a lease for a year, bearing date the day next before the day of the date of the same indenture of appointment and release, as therein mentioned; and also reciting that the said C. B. Courtenay was desirous of making a provision for the plaintiff and the children of the said C. B. Courtenay by the plaintiff—it was witnessed that, for the considerations therein mentioned, the said C. B. Courtenay, pursuant to a power limited and reserved to him, as in the same indenture mentioned, irrevocably directed and appointed that the premises, &c., should remain and be to the several uses therein declared. And the said William Cooke did, at the request of C. B. Courtenay, grant to T. Stinson, since deceased, and Bolton, the same premises, to the use

Courtenay v. Wright.

of Stinson and Bolton, their heirs and assigns, upon trust for repairs, &c., and then for the plaintiff and her children. The same indenture then recited that the said C. B. Courtenay and his wife (the plaintiff) had contracted and agreed with the said C. Wright for the absolute sale to him of one annuity or clear yearly sum of £105 17s. 6d., to be paid to the said C. Wright, his executors, administrators, and assigns, during the natural life of the plaintiff, to be secured in manner thereafter named, for the price of £999, and — reciting that it was intended that the said C. B. Courtenay and Bolton should, immediately after the execution of these presents, execute a deed poll, or warrant of attorney, for £2,000 for money borrowed and costs of suit, and also reciting that it was intended that judgment should be immediately entered upon the said warrant of attorney — it was by the said recited indenture witnessed, that, in consideration of the sum of £999, by the said C. Wright paid to the said C. B. Courtenay, the plaintiff, &c., did, each of them, for herself, himself, and the plaintiff, in respect of her separate estate, appoint and did agree with the said C. Wright, his executors, administrators, and assigns, that they would pay the said annuity by quarterly payments on the, &c., in every year, without any deduction or abatement whatsoever, and if the plaintiff should depart this life on any other day than one of the said quarterly days of payment, a proportionate part thereof. And the said indenture contained a covenant that the plaintiff would at any time thereafter, at the request and desire of the said Charles Wright, appear in person at any office of insurance within the cities of London and Westminster, in order that the said Charles Wright, his executors, administrators, or assigns, if he or they should think fit, might insure the life of the plaintiff in any sum not exceeding £1,000; and that the plaintiff would not leave the kingdom during the subsistence of the said annuity without giving twelve months' notice to the said Wright, that he might make known the same at the insurance office where the plaintiff's life was insured; and that the additional premiums for the purpose of keeping on foot any policy or policies of insurance which the said Charles Wright, his executors, administrators, or assigns should effect, for any sum not exceeding £1,000, might be paid to the said insurance office in order to prevent any loss or damage to the said Charles Wright; and further, that they the said C. B. Courtenay, C. Bolton, and the plaintiff, or one of them, should pay to the said Charles Wright, his executors, administrators, or assigns, all sums which he might pay to the said office or offices for additional premiums within one calendar month after such payment, and that the said Burnham might deduct and retain for the said Charles Wright the amount of such last mentioned sum or sums. The deed also contained a proviso that the judgment should be entered up as further security for the said annuity, and such payment as aforesaid in respect of any additional premium. And it was by the said indenture provided, that, after the decease of the plaintiff, or on repurchase of the said annuity, and full payment to the said Charles Wright, his executors, administrators, or assigns of the said annuity, and all arrears thereof up to the decease of the plaintiff, and all such last mentioned payments, costs, charges, and expenses as aforesaid, that the said Charles Wright should enter satisfaction on the judgment, &c.; and it was agreed that in case the said C. B. Courtenay, C. Bolton, and the plaintiff, or either of them, should be minded

Courtenay v. Wright.

or desirous of repurchasing the said annuity or yearly sum of £105 17s. 6d., and of such his or their intention should give three calendar months' notice in writing unto the said Charles Wright, his executors, administrators, or assigns, then and in such case he the said Charles Wright, his executors, administrators, or assigns, should and would, at the expiration of the said three calendar months for which such previous notice should be given as aforesaid, on receiving of and from the said C. B. Courtenay, C. Bolton, and plaintiff, or either of them, or the executors, administrators, or assigns of the said C. B. Courtenay, full payment of the said annuity or yearly sum of £105 17s. 6d., and all arrears thereof up to and including the day of repurchasing the same, together with a proportionate amount and part of the said annuity or yearly sum, in case such repurchase should be made on any other day than one of the said quarterly days of payment for the time being, which should have elapsed from the last preceding quarterly day of payment up to and including the day of such repurchase, all and every such sum and sums of money (if any) which should be then due for or on account of any such payment or payments in respect of any additional premium or premiums as aforesaid, or any such costs, charges, or expenses, occasioned by the non-payment thereof respectively, and take the sum of £999 of lawful money of Great Britain in full, for the purchase of the said annuity or yearly sum of £105 17s. 6d.; and then the said Charles Wright, his executors, administrators, or assigns, and also that the said William Burnham, his executors, administrators, or assigns, should and would thereupon at the request, and at the proper cost and charges in law, of the said C. B. Courtenay, C. Bolton, and the plaintiff, or either of them, or their assigns, release, assign, or otherwise dispose of the said annuity or yearly sum of £105 17s. 6d. and all securities for the same, unto the person or persons so redeeming the same, or unto the person or persons as he, she, or they, so redeeming the same, should in that behalf nominate, appoint, and acknowledge, or cause to be acknowledged, satisfaction on the record of the said judgment, and do any other act, deed, or thing necessary or advisable for the releasing, assigning, vacating, and discharging the said annuity or yearly sum of £105 17s. 6d. so to be repurchased, and the several securities given for securing the payment thereof as aforesaid, as by the person or persons so redeeming the said annuity, or his, her, or their counsel in law, should be reasonably devised, advised, or required, so that for the doing thereof the said C. Wright and W. Burnham, or either of them, or either of their executors, administrators, or assigns, be not compelled or compellable to go or travel from their or either of their usual place or places of abode.

The following passage was added by amendment:—

The plaintiff subsequently attended at the office of her then solicitors, Messrs. Harvey & Wilson, who also acted as the solicitors of the said Charles Wright, for the purpose of executing the said indenture, when the said Mr. Harvey read the indenture aloud in the presence of the plaintiff and the said Charles Wright and the said Mr. Wilson. The plaintiff remarked that the return of the policy in the event of redemption of the annuity was not provided for by deed, whereupon the said Mr. Harvey informed the plaintiff that such a provision would invalidate the deed, and the said Charles Wright promised that no misunderstanding should arise on his part, as he clearly un-

Courtenay v. Wright.

derstood that the policy and any bonuses which might be declared thereon were to be the property of the plaintiff in the event of the redemption of the annuity.

Shortly after the execution of the deed, Charles Wright effected an insurance on the life of the plaintiff with the Economic Insurance Company for £1,000, at a premium of £35 17s. 6d.

The annuity was paid regularly until 1829, when, default being made, Charles Wright entered into possession of the rents and profits of the leasehold premises, and continued to receive them till his death.

C. B. Courtenay died on the 26th of March, 1838. In February, 1847, the plaintiff applied to the said Charles Wright to repurchase the annuity, when a correspondence took place, in the course of which, Wright having claimed the policy, nothing was done, and on the 11th of September, 1847, the plaintiff filed her original bill for redemption. In 1851 Charles Wright died, and the suit was revived against his executors on the 26th of December, 1859. The bill prayed for the usual redemption decree, and a declaration that, on paying what should be found due on the account and for premiums, that the plaintiff was entitled to an assignment of the securities, including the policy, and that on such payment the defendants might be decreed to assign the same.

On behalf of the plaintiff, the following letter was tendered and objected to by the defendant: —

“In the year 1824, Dr. Courtenay was in embarrassed circumstances, and to avoid law proceedings, which had been commenced, Mrs. Courtenay consented to raise £1,000, by way of annuity, upon the property in question; for this purpose she consulted Messrs. Harvey & Wilson: the other partner in the firm, Mr. Wood, was unknown to her. In the interview with Mr. Harvey, he said he had a client who would advance the money immediately; but said Mrs. Courtenay, for the security offered, must go to some insurance office and ascertain if her life was insurable, she having only a life interest in the property. Mrs. Courtenay inquired whether she should go to any particular office, when the reply was, wherever she pleased, as she was to pay for the policy, and which would belong to her when the annuity was paid off; to secure the policy to her she must pay in all £10 per cent. on the £1,000. The bonuses on the policy would belong to her as they became due, and might enable her to redeem the property at some other time. When the deeds were prepared and ready for signature, Mr. Harvey read the annuity deed in the presence of Mrs. Courtenay, Mr. Wright, the annuitant, and Mr. Wilson, when Mrs. Courtenay observed that the return of the policy, if she wished to pay off the annuity, was not named in the deed. Mr. Harvey and Mr. Wilson both replied that the deed had been prepared by Mr. Chitty, who had stated to them that the deed would be invalid with such a clause in it, but as all securities were to be returned as mentioned in the deed, and Mr. Wright in fact had no other security for the return of his loan, there could be no dispute on the subject whenever Mrs. Courtenay could pay the loan. Mr. Harvey then impressed this on the mind of Mr. Wright, who verbally and faithfully promised no misunderstanding on his part should arise, as both policy and the bonuses, he already understood, belonged to Mrs. Courtenay in the event of the return of the £1,000. The annuity deed was then stated to be for £999, to save some stamp duty,

Courtenay v. Wright.

but Mr. Harvey called upon Mr. Wright to pay to Mrs. Wright £1 to make up the £1,000, which he did.

“ This was attested as follows : —

“ The above statement is perfectly true; I was present at the time alluded to. C. B. WILSON.

“ 4th September, 1855.”

The defendants in their answer denied that there was any contract as to the policy except what appeared on the deed, and alleged that the defendant, Charles Wright, was to be at liberty, out of his own resources, to insure the life of the plaintiff, and that he did so accordingly.

Mr. Bacon & Mr. H. Williams, for the plaintiff. This case does not come within the principle of the decision in the case of *Gottlieb v. Cranch*.¹ That case was decided on the principle that where the grantor of an annuity voluntarily insured the life of the grantee, and paid the premiums on the insurance, the policy, on redemption of the annuity, belonged to the grantee, and not to the grantor. Here the very thing which was wanting in *Gottlieb v. Cranch* to complete the title of the debtor, was supplied, because it was in evidence that, on the occasion of the treaty for the loan, there was a distinct stipulation that in case of redemption the policy should be the property of the grantor. But here the purpose of the insurance was made perfectly plain, as there was a covenant for payment of any sum which the grantee might prove to pay for additional premiums in case the plaintiff went abroad. If the policy were not a security for the debt, on what principle could the grantor be charged with the additional sums payable on her life? If, however, the policy was, as on the true view of the transaction it was submitted it was, a security for the debt, it was within the contract to deliver up all securities on repurchase of the annuity. It was submitted that this at once distinguished the case from *Gottlieb v. Cranch*. [The VICE-CHANCELLOR mentioned the cases of *Lea v. Hinton*,² *Drysdale v. Piggott*.³] Those cases were so far favorable to the plaintiff that they narrowed the decision of *Gottlieb v. Cranch*, but it was submitted the plaintiff's case stood clear of that decision.

Mr. Malins & T. Terrell, for the defendants. With regard to the alleged arrangement, it was not alleged in the original bill, but was added long after by amendment. It was submitted that the court could not place any reliance on that part of the plaintiff's case.

It is settled by the decision in *Gottlieb v. Cranch*, that where the grantee of an annuity, out of his own moneys, voluntarily insures the life of the grantor, the policy and the bonus belong to the grantee — inasmuch as he is in such case entitled to retain the amount of the premiums, and become what is called his own insurer.

It might be that the amount of the annuity was calculated with a view to an insurance, but that circumstance, it may be conjectured, existed in *Gottlieb v. Cranch*.

The fallacy of the argument derived from cases where the insurance was effected to insure a debt is, that in the case of an annuity the policy is not a security. In the case of *Drysdale v. Piggott*⁴ the policy was given as a secu-

¹ *Ante*, p. 82.

² *Ante*, p. 90.

³ *Ante*, p. 88.

⁴ *Ante*, p. 90.

urity for a debt, and the decision in *Lea v. Hinton*¹ proceeds on the same principle.

Mr. Bacon, in reply, contended that the evidence of the original arrangement was indisputable; therefore it was no objection that the allegation in the bill was added by amendment. It was true that in *Lea v. Hinton* and *Drysdale v. Piggott*, the policy was a security, but so it was here, and therefore the attempt to distinguish those cases from that now before the court failed. *Phillip v. Eastwood*² was also cited. See *ex parte Andrews*.³

The VICE-CHANCELLOR. This is a suit for the redemption of a life annuity, and the only question is as to the right of the defendant to retain for his own benefit, after the redemption, the policy of assurance on the life of the grantor of the annuity. The bill prays, that upon payment of what shall be found due for redemption, the defendants may be ordered to assign the annuity, securities, and policy of assurance to the plaintiff.

It appears that the payment of the annuity was secured on leasehold property, of which the plaintiff was tenant for life, and was also secured by warrant of attorney, to enter up judgment against the plaintiff and her husband and another person as surety. There is also a covenant in the usual form, that the plaintiff should appear at an insurance office, and provide proper vouchers, in order that Charles Wright, (the grantee of the annuity,) his executors, administrators, or assigns, if he or they should think fit, might insure her life for any sum not exceeding £100; and that she would not leave the kingdom without notice, and for the payment of any additional premium.

The proviso for redemption and repurchase binds the grantee, upon payment of the redemption money, to enter satisfaction on the judgment, and there is a covenant by the grantee to release, assign, and otherwise dispose of the annuity, and all securities for the same, to the person redeeming, and to do all acts necessary for "avoiding, releasing, assigning, vacating, and discharging the said annuity, &c., so to be repurchased, and the said several securities given for securing the repayment thereof as aforesaid."

In the defendant's answer it is stated that there was no contract whatever as to the policy of assurance except what appears by the deeds; and that the grantee was to be at liberty, entirely at his own discretion, and out of his own resources, to insure the plaintiff's life if he thought fit, the plaintiff covenanting to do what was necessary to enable him to effect and preserve any policy on her life which he might think proper to effect.

For the plaintiff there is some evidence to prove an averment in the amended bill, purporting that, before the execution of the deed the plaintiff objected that there was no provision in the deed that the policy of assurance would be delivered up on the redemption of the annuity, but that the plaintiff was then assured that the introduction of such a clause would invalidate the deed; but she was expressly assured and told that it was quite understood that the policy would be delivered up to her if she redeemed the annuity.

This part of the case has been materially weakened by the circumstance that the original bill, which was filed in the lifetime of the grantee, did not contain this averment, and it was introduced by amendment only after the death of the grantee.

¹ *Ante*, p. 90.

² Lloyd & G. 296.

³ 1 Madd. 573.

The defendants (who are the executors of the grantee) rely on the authority of the case of *Gottlieb v. Cranch*,¹ as decided by the lords justices on appeal. In that case it was decided that the grantee of an annuity, who had insured the life of the grantor, was not bound to deliver up the policy of assurance to the grantor on the redemption of the annuity.

But there are two subsequent decisions of the lords justices, in cases where the right of a creditor to a policy of assurance effected voluntarily by him to secure his debt has been more fully considered.

In the case of *Lea v. Hinton*,² insurance by the creditor was entirely optional and not on any contract, and the premiums were in the first instance paid by the creditor out of his own moneys. On the evidence of the transaction, it was considered by the court, or rather presumed, that the insurance was effected as an indemnity to the creditors. One of the lords justices said: "The facts before the court render inevitable the conclusion that Mr. Hinton effected it for the purpose of protecting and indemnifying himself as a surety or creditor, or as a surety and creditor of Mr. Lea, in whose life Mr. Hinton does not appear to have had an interest in any other sense. Nor can he be heard to say that he received the money which he did receive for any other purpose, denying, as he does, that he effected the policy on the account or for the benefit of Mr. Lea."

Therefore, on the ground that substantially the policy of assurance was effected by the creditor to secure payment of the debt, the court of appeal held that the policy of assurance did not belong absolutely to the creditor, and that he was not entitled to it and also to the payment of his debt, he having charged the debtor in account with the expense and premiums of assurance. In that case, the expenses and premiums of assurance were paid primarily by the creditor out of his own moneys, and there was a voluntary application of his own moneys for his own benefit.

In the case of *Drysdale v. Piggott*,³ where the creditor effected an insurance in his own name, and had paid all the premiums except the first out of his own moneys, and the debtor on being applied to expressly refused to pay the premiums, and was not bound by any covenant or legal obligations to pay them, the master of the rolls held that the debtor, by refusing to pay the premiums, had abandoned and lost all right to the policy. But this decision was reversed by the lords justices.

In each of these cases the payment of the premium by the creditor was optional, and was made primarily with his own moneys, — paid for a purpose primarily beneficial to himself. Nevertheless, as the nature of the transaction showed that the substantial purpose of effecting the policy was to secure the debt, the court of appeal held that when the creditor was paid, the policy of assurance was to be given up to the debtor.

In the present case, Mr. Malins, on behalf of the defendants, pressed by these decisions of the court of appeal, has endeavored to distinguish them as cases between debtor and creditor, and not applicable to the case of a policy of assurance effected by the grantee of an annuity. But it seems impossible to

¹ *Ante*, p. 82.

² *Ante*, p. 88.

³ *Ante*, p. 90.

Courtenay v. Wright.

say that the relation of debtor and creditor does not subsist between the grantor and grantee of a life annuity. The grantee is a creditor of the grantor on the covenant for payment of the annuity, and on the judgment entered up under the warrant of attorney for the money advanced to purchase the annuity. In what respect does the redemption of an annuity differ from the payment of a debt? The transaction on the redemption of an annuity is a payment and extinction by the grantor of the debt which he owes on the covenant to pay the annuity, and also of the debt which he owes on the judgment for the amount of the redemption money. It is impossible to disconnect the policy of assurance from the debts due on the judgment and the covenant. The money sufficient to enable the grantee, if he chose, to effect the policy, was included in the debt on the covenant.

The argument that the grantee was not bound to apply towards the insurance the proportion of the annuity which was fixed with a view to that purpose, — and that therefore the insurance being entirely in the option of the grantee, it must be considered as paid for out of his own money\$, — should have greater force in such cases as *Lea v. Hinton* and *Drysdale v. Piggott*. In these cases the insurance was entirely optional, and the creditor was not, as in the case of the annuity, supplied beforehand with money from the debtor sufficient to defray the continuing expenses and premiums on the assurance.

Indeed, the right of the grantor to have the policy of assurance delivered up as one of the securities for the debt obtained at his expense, seems much stronger when due consideration is given to the effect of the covenant for the payment of the additional premium on going abroad. There is nothing optional in that obligation. It provides absolutely and imperatively that the grantor shall pay the sum necessary to keep the policy in force. Such a stipulation places the right of the grantor of the annuity, when he comes to pay and extinguish the debt, much higher than the right of the debtor in the cases of *Lea v. Hinton* and *Drysdale v. Piggott*.

It therefore seems to me that I am bound to follow the doctrine established by those two cases, the most recent, and apparently the most matured decisions of the court of appeal.

The principle to be extracted from these two cases seems to be this : —

Where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shows that the policy of the assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays his debt, which it was directly or indirectly at his expense effected to secure. This is an application of the maxim, "*Qui sentit onus sentire debet et commodum.*" The same principle is recognized by the civil law, as appears by the following passage in the Digest (50, 17, 10): "*Secundum naturam est, commoda cujusque rei eum sequi quem sequuntur incommoda.*"

It is incontrovertibly established in this case that, on the face of the instruments, it was contemplated that the grantee of this annuity should have the means of effecting this policy of assurance, and that he stipulated for payment

Knox v. Turner.

by the grantor of a sum sufficient to effect it; that he bound the grantor by covenant to pay money which might become necessary to keep the policy in force; that the purpose of effecting the policy was to indemnify and secure to the grantee the money which he advanced to the grantor; that the repayment on redemption of the money so advanced by the grantee is a payment and satisfaction of every debt and obligation by the grantor to the grantee, for the security of which the policy of assurance was effected.

It follows that where the grantor makes this full repayment, he is entitled to have that security delivered up which has been effected substantially at his expense, because he was made to pay a sum calculated as an equivalent to the expense of obtaining the security.

If there were any doubt as to the right of the plaintiff, the language of the deed seems to put it beyond all question. The words of the covenant, which bind the grantee as to the securities which he is to deliver up on redemption, are these: "The said several securities given for securing the repayment thereof as aforesaid." It seems to be impossible, on any true construction of the deed, to say that the policy of assurance which the deed contemplates, if the grantee chose to effect it, is not a security for repayment within the words of this covenant.

It appears, therefore, that the case of the plaintiff is established, and that there must be a decree for the delivery up to her of the policy of assurance. As this is the only question in the cause, the plaintiff is entitled to the costs of the suit, but must pay all other costs usual on redemption.

KNOX vs. TURNER.

(Law R. 9 Eq. 155. Coram Stuart, V. C. 1869.)

Redemption of annuity. — The circumstances under which the grantor of an annuity is entitled on redemption to have a policy of assurance effected on his life by the grantee delivered up, considered.

AN indenture, dated the 26th of June, 1839, recited that Brownlow William Knox — the plaintiff in this cause — was, under a settlement, and under the will of Dame F. Sutton, entitled during his life to the annual proceeds of certain sums of stock specified, amounting in the whole to over £87,000; that he had contracted with William Turner for the absolute sale to him of an annuity of £318 sterling, to be paid to William Turner, his executors, administrators, or assigns, during the life of the plaintiff, but repurchasable upon the terms thereafter expressed, and that the sole and *bonâ fide* consideration to be given for the purchase of the annuity was the sum of £3,999 sterling; that upon the contract for the sale and purchase of the annuity, it was agreed that the same should be secured by an assignment unto William Turner upon certain trusts of the proceeds of the said several sums of stock; and that upon the contract for the sale and purchase of the annuity, it was further agreed that the same

Knox v. Turner.

should be secured by a judgment to be entered up against the plaintiff at the suit of William Turner, by means of a warrant of attorney, at the costs of the plaintiff. The deed witnessed that, in consideration of the sum of £3,999 paid by William Turner to the plaintiff, he covenanted that he would during his life pay unto William Turner, his executors, administrators, or assigns, the annuity of £318 by equal half-yearly portions, commencing on the 26th of December, 1839, and he assigned the annual proceeds which should during his life accrue in respect of the several sums of stock unto William Turner, his executors, &c., upon trust to permit the plaintiff to receive them until the annuity should be in arrear for thirty days; but in case it should be in arrear, then upon the trusts expressed for enforcing payment by mortgage, sale, or otherwise; and he also covenanted with William Turner that he would, when required by him personally, attend at any office of insurance in London or Westminster, to the end that a policy of assurance might be obtained by and at the expense of William Turner, his executors, &c., on the life of the plaintiff. The plaintiff further covenanted that he would not at any time during the continuance of the annuity go on the seas or in parts beyond the seas, or enter, or engage, or be employed in actual service in any military or naval capacity without giving to William Turner, his executors, &c., as early notice thereof as might be; and that in case William Turner, his executors, &c., should have previously assured, or should assure, any sum of money not exceeding £3,999 on the life of the plaintiff, and should pay any additional rate of assurance by reason of the plaintiff going on the seas or beyond the seas, or entering or engaging, or being employed in actual service in any military or naval capacity, he (the plaintiff) would pay to William Turner, his executors, &c., all such sums of money as he or they should pay as and for additional premiums, and all such sums should be raiseable under the trusts; and it was agreed that in case the plaintiff or his assigns should at any time after the expiration of one year from the date of the deed be desirous of repurchasing the annuity, and should give to William Turner, his executors, &c., three months' notice of such desire, and upon the expiration of such notice should pay him or them the sum of £3,999, and all sums of money which should be due in respect of costs incurred in the execution of the trusts, then William Turner, his executors, &c., should accept the sum of £3,999 as and for the price of repurchase and satisfaction of the annuity, and after such repurchase the annuity should cease, and the annual proceeds assigned should be reassigned to the plaintiff or his assigns, and satisfaction should be acknowledged on the judgment at the costs of the plaintiff.

Contemporaneously with the execution of the deed, judgment was entered up upon the warrant of attorney against the plaintiff, and also contemporaneously with the execution of the deed, a policy of assurance on the life of the plaintiff for the sum of £4,000, dated the 26th of June, 1839, was effected in the name of William Turner in the Legal and General Assurance Office.

William Turner died on the 10th of January, 1868. The defendants were his widow and the assignees of the annuity and the policy.

On the 30th of April, 1868, in pursuance of notice, the plaintiff repurchased the annuity, and paid the money for such repurchase to the defendants, who

thereupon reassigned to the plaintiff the annual proceeds of the said several sums of stock.

The plaintiff required the defendants to assign to him the policy of assurance, and the moneys thereby assured, and the bonuses thereon, but they refused to do so on the ground that they were absolutely entitled to them. The repurchase of the annuity was completed without prejudice to the question whether the plaintiff or the defendants were entitled to them. The defendants still refusing to assign the policy, and having threatened to surrender it to the office for the sum of £2,110, and to apply that sum for their own benefit, the plaintiff, in June, 1868, filed this bill for a declaration that he was entitled to the said policy on his life, and the moneys thereby assured, and the bonuses thereon, and for a decree against the defendants to assign the same to him.

The evidence of the plaintiff in support of an allegation in the bill was, that though the transaction was in form the grant of an annuity, it was in fact a loan of the sum of £3,999 at interest, and that in fact it was agreed between him and William Turner that, as part of the security for the same sum and interest, an assurance on his life, should be effected in the name of William Turner, but at his (the plaintiff's) cost, and that the amount of the annuity should be, and the same was fixed so as to include the amount of the premiums of such assurance.

The evidence on the part of the defendants was, that on the 4th of June, 1839, the solicitor at that time of the plaintiff wrote to Messrs. Stone & Turner to the effect that a client of his was entitled for life to the dividends of certain funds, specifying them, standing in the names of three trustees, and he said, "The age of my client is thirty-five, and I propose to borrow £4,000, for which an annuity of £318 will be granted, to be repurchasable at option, after the expiration of one year, upon giving three months' notice and repayment of the principal. . . . The only incumbrances affecting the trust funds are an annuity of £116 granted in consideration of £1,100, and an annuity of £196, granted in consideration of £2,000, to be both repurchased out of the £4,000 now to be raised. I will thank you to consider the above proposal, and to let me know if you can forthwith furnish the loan required." Messrs. Stone & Turner in the first instance applied to the Clerical, Medical, and General Life Assurance Society for the required sum, and the reply of the secretary was: "Your proposal to borrow for Captain Knox £4,000, by way of mortgage and assurance on the securities stated in your letter, was taken into consideration by a board of directors, and I am instructed to inform you that the board agree to lend the sum required at $4\frac{1}{2}$ per cent., besides assurance, provided the office in which his life may be assured will agree to put an indorsement on their policy to protect the office in case Captain Knox goes beyond the limits of such policy without acquainting this society of it." The office in which it was intended to assure Captain Knox's life refused to put such an indorsement on the policy, and consequently the Clerical, Medical, and General Life Assurance Society declined to advance the money, and it was subsequently advanced by William Turner on the terms originally proposed. The first premium and duty amounted together to £116 3s. 4d., which was advanced by Henry Scott Turner for William Turner, and paid by a check on his own

Knox v. Turner.

bankers, and the amount was afterwards repaid by William Turner. A sum of £200 was agreed to be paid by the plaintiff in respect of the costs connected with the preparation of the deed and the negotiation of the purchase of the annuity. This was an arrangement between Mr. Stone and the solicitor of the plaintiff, and consequently no bill of costs was rendered. The £200 included the costs of investigating the plaintiff's title to the security for the grant of annuity, of the repurchase of the two annuities, and of the preparation of the deed, and of the warrant of attorney and judgment, and the stamp duty of £40 thereon, and the procuration fee of £20 upon the advance.

Mr. *Greene*, Q. C. & Mr. *Townsend*, for the plaintiff. The transaction in this case, as proved by the evidence, was, though in the form of a grant of annuity, in fact a loan at interest. It must be observed that the plaintiff covenanted that he would, if he went abroad, pay any additional premium, and how therefore can it be successfully contended that he has no interest in the policy, or that the policy is not a part of the security for the debt? This case is therefore distinguishable from that of *Gottlieb v. Cranch*.¹ If the policy was not part of the security for the loan, on what principle could the plaintiff be charged with any additional sum paid by Turner as premium? This case is governed by the decision in *Courtenay v. Wright*,² in which it is stated that the principle to be extracted from *Lea v. Hinton*,³ and *Drysdale v. Piggott*,⁴ — cases decided subsequently to *Gottlieb v. Cranch*, — was, that where the relation of debtor and creditor subsists, and the true construction of the instruments and the evidence of the real nature of the transaction shows that the policy of assurance was effected by the creditor as a security or indemnity, if the debtor directly or indirectly provides money to defray the expense of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays the debts which it was directly or indirectly, at his expense, effected to secure. [They also cited *Freme v. Brade*.⁵]

Mr. *Dickinson*, Q. C. & Mr. *Bedwell*, for the defendants. First, a policy of life assurance is not a contract of indemnity at all. *Dalby v. India and London Life Assurance Company*; ⁶ *Law v. London Indisputable Life Policy Company*.⁷ The holder of the policy effected on the life of the plaintiff paid all the premiums; but it has been contended that they were included in the annuity, and that, in fact, they were paid by the plaintiff — the annuity being far beyond 5 per cent. on the money lent by Turner. There is not the slightest evidence of any such contract, and, in fact, the annuity did not include the premiums. The policy had nothing to do with the annuity from the moment of its redemption. The transaction was one of sale and purchase, and the relation of debtor and creditor — taking the facts *quoad* the £3,999 — was never established; indeed, the redemption of an annuity is very different to the ordinary case of debtor and creditor. If Turner had not assured the life of the plaintiff, could it be successfully contended that the plaintiff could refuse to

¹ 4 D., M. & G. 440.² *Supra*.³ *Supra*.⁴ *Supra*.⁵ 2 De G. & J. 582; *post*, p. 182.⁶ 15 C. B. 365.⁷ 1 K. & J. 223.

pay the difference between 5 per cent. (£200) and the £318? The answer is, there is no such contract in the deed. The plaintiff covenanted to pay £318, and if he had refused to pay more than £200, he could have been sued at law, and he would have had no equity to an injunction to restrain the action. In every case excepting that of *Courtenay v. Wright*, it has been held that the grantee of an annuity secured by contingent interests was entitled to the policy to prevent loss to him in the transaction. The case of *Gottlieb v. Cranch* governs this case, and if the decision there is to stand, then the plaintiff has no right to this policy. The cases of *Lea v. Hinton* and *Drysdale v. Piggott* are in some respects different to that of *Gottlieb v. Cranch*, upon the authority of which the plaintiff's bill is entirely indefensible, and ought therefore to be dismissed with costs.

Mr. *Greene*, in reply. The facts all show that this was a loan of money. The letter, which was the inception of the transaction, proves that the intention was to borrow £4,000. The warrant of attorney enabled Turner to enter up judgment against the plaintiff, and clearly shows that the relation of debtor and creditor existed. This circumstance is not found in *Gottlieb v. Cranch*.

Sir JOHN STUART, V. C. This case is not distinguishable from the case of *Gottlieb v. Cranch*. If that case is to be considered as an authoritative decision, the duty of the court now is to dismiss this bill. In the present case, as in the other, the question was as to the right of the grantor of an annuity upon the repurchase of the annuity, and upon the extinction by payment of all his obligations to the grantee, to have delivered up a policy of assurance effected by the grantee pursuant to a stipulation binding on the grantor but not on the grantee. If the case of *Courtenay v. Wright* had been brought before the court of appeal, the objections there suggested as to the decision in *Gottlieb v. Cranch* might perhaps have been considered, and might perhaps have been removed on satisfactory grounds, if they are not well founded.

In the present case, as well as in *Courtenay v. Wright*, the arguments took a wider range, and the question was discussed on grounds beyond those which appear in the report of *Gottlieb v. Cranch*. In the latter case the argument was cut short, and the instruction to be derived from the report is confined to the expression of strong and clear opinions, without the support of any argument except that founded on the option given to the grantee as to the application of the money supplied by the grantor.

What seems to me unsatisfactory as to the authority of that case is, that it was assumed and stated by the court to be a general and undisputed rule, that where the grantee of an annuity assures the life of the grantor, the policy effected belongs to the grantee. There is certainly no trace of any such general rule. If there were such a rule, as all arguments are silenced by a peremptory rule, the question presented for the decision of the court need not have been argued. It was, however, upon the ground of the option in the grantee to apply the money of the grantor in effecting the policy, that the decision was rested. There would be great force in the argument founded on the option, were it not that the terms of the transaction and the contract show

that the extra payment was unquestionably exacted for the purpose of securing and indemnifying the grantee at the expense of the grantor. The option which the grantee had of retaining the extra payment for his own benefit without effecting the policy, is only the option of another mode of indemnity. The argument that the grantee might at his option sell the policy at any time before redemption, and that the grantor could not on redemption claim credit for the amount produced by the sale of the policy, is a very powerful argument to show that the policy is not a security for the benefit of the grantor. Certainly, if the grantee exercised his option in that way, he would seem to exercise a legitimate option of destroying any right of the grantor. In this respect the policy, if it be a security held at all for the benefit of the grantor, must stand on a different footing from an ordinary security, as to which there can be no such option.

But there remains the question whether the grantor can be treated as having no interest in the policy which he supplied money to effect, if the grantee has not exercised the option of selling it. This question seems to be the same which arises on the option in the grantee not to effect any policy at all; and both questions must be resolved on considering the effect of the proviso for repurchase as part of the general transaction, and the reciprocal rights under the whole contract.

It has been argued that the grantor and grantee of an annuity of this kind do not stand in the relation of debtor and creditor. Considering the covenants and obligations of the deed, it is impossible to sustain this proposition. What is really meant is, that the grantor is not a debtor for the price of the annuity, because he is not bound to repay the price, and that the repayment by repurchase is optional. But if he exercises the option of repurchasing, he has repaid the grantee, and has extinguished his debt and obligation for payment of the annuity, and both parties are restored to their previous rights. The equity of a debtor who extinguishes and satisfies the claim of his creditor, is to get back all securities exacted from him as securities for the obligation which he has discharged.

But it is said that the policy of assurance is not a security because its existence was optional, and its existence and nature as a security so peculiar, that not only its creation but its continuance was in the option of the creditor, who, while he remained unpaid, might have sold it for his own benefit without being accountable for the profit. None of these circumstances deprive the policy of its character as a security.

It is, however, said that if it be a security it never was the property of the debtor, but is property created by the creditor out of his own money and for his own benefit. The force of that argument seems to be destroyed by this consideration: that, in point of fact, and according to the terms of the contract, the debtor supplied the money which purchased the security, and was compelled by the contract to assist in effecting the security. Property purchased with money supplied by the debtor and obtained by his active concurrence, which concurrence he was bound by the contract to give for securing the creditor, is no less a security because the creditor was not bound to procure the security, and after he procured it might, during the subsistence of the

debt, sell the security without being liable to account for the proceeds. When the debtor exercises the right of repurchase, and extinguishes all his obligations to his creditor, and finds the creditor in possession of the security obtained with his money and at his expense and by his concurrence, why is the creditor to retain such a security so obtained, when all his rights as a creditor are satisfied? Why is the equity of the debtor to have the security restored to be denied in such a case? In *Gottlieb v. Cranch*, the argument which was stopped in the appeal court was very ably urged in the court below by the counsel for the grantor of the annuity. It mainly turned on the want of privity of the grantor as being no party to the contract on the policy. The same argument was urged in the present case, and supported by reference to the decision of the exchequer chamber in *Dalby v. India and London Assurance Company*,¹ which decided that the contract on a policy of life assurance is not a contract of indemnity. That is very true as between the parties to the policy; but where the policy is effected by a creditor on a contract with his debtor, who is no party to the policy, but supplies the money and the premiums, it is an entirely different question, and unless there be some stipulation to the contrary as between the debtor and creditor, it is a security and an indemnity. And as to privity, if it be part of a written contract between a debtor and his creditor that a policy shall be effected, and money sufficient to pay the premiums be contracted to be supplied, and is supplied by the debtor, it is impossible, on any true view which has yet been shown, to say that a debtor who has according to the contract concurred in effecting the policy and supplied the money to effect it, is a stranger and not privy to a policy effected on such a contract, or less interested in it when effected, because the creditor had an option not to have effected it, and an option, while his debt was unpaid, to sell it for his own benefit. If neither option be exercised, and the security at the time of payment is found in the creditor, the debtor's right seems clear, unless it can be shown to be no security at all. A security — which a creditor is not bound to obtain — cannot be less a security when it is actually obtained. Nor can the debtor whose money is invested in purchasing the security be less interested in it because his creditor was not bound so to invest it or preserve it.

No true view can be taken of the question, which depends so much on the optional nature of the contract, unless there is embraced in the view the circumstance that the stipulation for redemption is also an option. The payment of the debt by redemption is no less an absolute satisfaction and extinction of the creditor's rights because it was optional, than the debtor's right to the security becomes absolute if the creditor has not exercised any option to destroy it — if, in fact, he exercised the option to take it and to expend the money supplied by his debtor in preserving it.

To assume that the question is decided by treating the policy as the property of the grantee of the annuity, is to argue on the equivocal meaning of the word "property." That he has a property in the security is clear enough; but that his property can be considered absolute and unqualified where it is created by contract between the debtor and creditor and created by moneys which the

¹ 15 C. B. 365; *S. C.*, ante, vol. 2, p. 371.

debtor was bound to supply for the purpose, does not seem to me to have yet been proved by any sufficient argument.

A peremptory rule would make argument unnecessary. But no such peremptory rule as was assumed by the court of appeal in *Gottlieb v. Cranch* is anywhere recorded. In *Courtenay v. Wright*, the cases of *Lea v. Hinton* and *Drysdale v. Piggott* were considered and discussed. They are in some degree distinguishable from *Gottlieb v. Cranch*. But the latter case is so entirely similar to the present, that if it is to be overruled it must be overruled by the court of appeal. I have endeavored to explain the difficulty I have felt as to the principle involved in the decision, in the hope that if the question occurs again before the court of appeal, there may be a more full judicial consideration and exposition of the doctrine. In the mean time, for the reasons which I have stated, it is with dissatisfaction and reluctance that I feel bound to dismiss the bill in the present case. It must stand dismissed, but without costs.

Solicitors: Mr. Henry Smith; Mr. Montagu Turner.

Note. — On appeal Lord Hatherley held, contrary to the opinion of the vice-chancellor, *supra*, that the case was not one of debtor and creditor, that the insurance was effected with the defendant's money, and that the bill must therefore be dismissed. Law R. 5 Ch. 515 (1870). So *Gottlieb v. Cranch* still stands as law. See also *Brown v. Freeman*, 4 De G. & S. 444; *Ex parte Lancaster*, Ib. 524.

ERASMUS ROBERT FOSTER, Public Officer of The Britannia Mutual Life Association, vs. THE MENTOR LIFE ASSURANCE COMPANY.

(3 El. & B. 48. Queen's Bench, 1854.)

Declarations as to health. Reassurance.—The M. Insurance Company executed a deed-poll, which was a life policy for one year, on the life of O. It was in the ordinary printed form of such policies, and commenced with the recital that the assured had on 21st November last caused to be delivered into the office of the M. a declaration in writing, signed by them, touching the age, past and present health, and other circumstances relating to O., which the assured had agreed should be the basis of the contract. And there was the usual proviso that if anything in the declaration was untrue, the policy should be void. In an action on this policy, the M. pleaded that the declaration was untrue. On the trial, it appeared that the policy was one of reinsurance by the B. Company, who had several years before insured O.'s life for a larger sum. On the negotiation for the reinsurance, all the papers relating to the original insurance were shown to the M. The M. sent to the B. one of their printed forms for a proposal for insurance, adapted to the case of an original insurance, having many printed questions relating to the health of the party, with blanks for the answers, and below, a printed declaration by the person whose life was to be insured that the above statement was true, and an agreement on the part of the persons who were to be assured that the declaration should be the basis of the contract, and that if anything therein contained was untrue, the policy should be void; with blanks at the bottom of the declaration for the signatures of the person whose life was to be insured, and of those in whose favor the insurance was to be made. The M. had bracketed together, in ink, the questions relating to the

 Foster v. The Mentor Life Assurance Company.

health of O., and written, "for these particulars, see B. papers attached." The manager of the B. signed under this his name, and returned the paper, with the blanks for the signature of the declaration not filled up. The B. papers were those relating to the original insurance, and contained a declaration by O. as to his then state of health. It was now admitted that this declaration was then true, but that the state of O.'s health had, without the knowledge of either the M. or the B., changed, and the declaration referred to the state of health at the time the paper was sent to the M. would no longer be true. After this paper had been sent in, the policy was executed, and sent to the B., who received and kept it without observation on the form of the recital. Some evidence was, without objection, given of a custom in reassurances to confine the declaration to the state of health at the time of the original insurance. The learned judge left it to the jury to consider all the circumstances, and say whether it was intended by both parties that the paper should be understood as a declaration as to O.'s present health. The jury found for the plaintiff. On a motion for a new trial the court were equally divided: EBLE and WIGHTMAN, JJ., for a new trial; COLERIDGE, J., and CAMPBELL, C. J., *contra*. The rule dropped.

DECLARATION on a policy of assurance to the trustees of the Britannia Mutual Life Association, under the seal of the defendants, whereby, "after reciting that the said trustees of the said association were desirous of effecting an assurance with the defendants upon the life of Gaspard Gabriel Gillion Alfred Count D'Orsay, in the sum of £1,500, and also reciting that the said trustees had caused to be delivered into the office of the defendants a declaration or statement in writing signed by them, bearing date the 21st day of November then last, setting forth the age, and the past and present state of health, and other circumstances touching the habits of the life of the said person on whose life the said assurance was to be effected, which alleged declaration, so far as it respects the age of the said person, was thereby recited to be admitted to be correct; and also reciting that the said trustees had agreed that the said alleged declaration or statement should be the basis of the contract between them and the defendants;" and reciting the payment of £65 2s. 6d. as a premium; it was by the policy agreed that the defendants insured to the trustees, for twelve calendar months from the day of the date thereof, the life of Count D'Orsay for £1,500. "And it was in and by the said policy provided that if anything averred by the said trustees in the alleged declaration so recited as aforesaid, and alleged to have been made by them, was untrue, the policy should be null and void, and all premiums and other moneys paid in respect thereof should be forfeited to the defendants." The declaration then set out the rest of the policy, which is not material to the questions discussed. Averment: that all conditions necessary to

entitle the plaintiff to receive the money insured thereby in the events therein mentioned have been performed and fulfilled. Further averment: that the "trustees did not, nor did the said company, in any manner aver or declare to the defendants anything that was untrue, in any declaration in writing or otherwise howsoever." Averment of interest in the assured, and of the death of Count D'Orsay within the twelve months. Breach, non-payment of the sum assured according to the policy.

Second count for money had and received, and interest.

Plea to 1st count: "That the said trustees, and the said company, did aver and declare to the defendants, in the said declaration mentioned in the said policy as agreed to be the basis of the said contract, something that was untrue; that is to say: that, at the time of the delivering of the said declaration into the office of the defendants, the said Gaspard Gabriel Gillion Alfred Count D'Orsay was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas, on the contrary thereof, the said Gaspard Gabriel Gillion Alfred Count D'Orsay was not then in a good state of health, but was then afflicted with a disease or disorder tending to shorten life."

As to the residue of the declaration: Never indebted.

Replication, taking issue on both pleas.

On the trial, at the London sittings after last Trinity term, before Lord Campbell, C. J., it appeared that, in 1850, the Britannia Life Assurance Company was divided into two companies: one of them was the company, now plaintiffs in this action, called the Britannia Mutual Life Association. On the division of the two companies, the Britannia Mutual Life Association took, as part of their share of the property, five life policies executed by the Britannia Life Assurance, on the life of the Duke of Beaufort for £5,000; on that of Mr. Brooke for £5,000; on that of Mr. Owden for £5,000; on that of Count D'Orsay for £4,500; on that of Mr. Cowan for £4,000.

The Britannia Mutual Life Association had resolved not to run a greater risk on any one life than £3,000. Mr. Foster, the nominal plaintiff, who was manager, was therefore directed to reinsure the surplus above that sum on each of these five lives above mentioned. He accordingly offered the five reinsurances to the Medical Invalid Office, the managers of which objected

Foster v. The Mentor Life Assurance Company.

to the Duke of Beaufort's life as being hazardous, and would not insure him under £30 16s. per cent., but were willing to take the other four at the ordinary rate. Foster then offered them to the manager of the defendants' office, stating verbally what had passed at the Medical Invalid Office; he said, that the whole five must be taken together; that, as the Duke of Beaufort's life was a hazardous one, 20 per. cent. premium would be paid for insuring the £2,000 on his life, but that the others must be taken at the rate of ordinary lives of their respective ages. He gave the addresses of the three lives insured, but said that Mr. Brooke's address was not known at the Britannia Mutual Life Association, and that if the Mentor Life Assurance wished to make inquiries about him, they must find him for themselves; and that Count D'Orsay was then in Paris; but that every particular about him was well known in London, and the Count was notoriously a first-class life.

At the same time he left with the Mentor Life Assurance Company all the papers relating to the original insurances of the five lives in question with the Britannia Life Assurance Company.

After this, five papers relating to the five assurances were sent over from the office of the Mentor Life Assurance Company to that of the Britannia Mutual Assurance Company, and returned. That relating to the assurance on the life of Count D'Orsay was, when given in evidence, as follows:—

Mentor Life Assurance Company, 2, Old Broad Street.

Proposal for Assurance.

<i>Questions.</i>	<i>Answers.</i>
1. Name, Residence, and description of the Party proposing Assurance?	} <i>Trustees of the Britannia Life Assurance Company.</i>
2. Name, Profession, or Occupation, and Residence of party whose life is to be assured?	
3. Amount and Term of Assurance, and according to which of the printed Tables it is to be effected; if according to Table I., whether the premium is to be payable Annually, Half-yearly, or Quarterly?	} <i>£1,500. Table I. whole Life.</i>
4. Place and date of Birth, and Evidence of Age?	<i>Paris, 4th February, 1801.</i>
5. Age next Birthday	<i>51.</i>

Foster v. The Mentor Life Assurance Company.

6. Whether married or single ?
7. If had the Small-pox, or undergone vaccination ?
8. If suffered from habitual Cough, Spitting of Blood, Asthma, or any disease of Chest or Lungs ?
9. If ever suffered from Apoplexy, Palsy, Insanity, Epileptic or other Fits, Dropsy, Rupture, Gout, Rheumatism, or any other disease tending to shorten life ?
10. Whether of sober and temperate habits ?
11. Whether of active or sedentary habits ?
12. Whether liable to any hereditary disease ?
13. Whether employed in the Naval or Military service ?
14. If resided abroad, state when, where, and how long ?
15. If there be any circumstances connected with health, habits, or otherwise, calculated to render an Assurance of Life more than usually hazardous ?
16. Whether the party has ever made a proposal for Assurance at this or any other office, and if so, what was the result of each such application ?
17. The name and residence of the ordinary Medical Attendant, and how long known to him ?
[If the party cannot refer to a Medical Man, the reason must be so stated in the answer, and in that case the party must refer to two Private Friends.]
18. If recently received advice from any other person or persons, give the name and address of such ?
19. The name and residence of any intimate friend, not being a relative or interested in the Assurance, and how long known to him ?

For these Particulars see Copies of Britannia Papers attached.

21st Nov. 1851.

E. R. Foster,

Resident Director.

DECLARATION. I, *Count D'Orsay*, above designed [designated ?] do hereby declare that I am at present in a good state of health, and am not afflicted with any disease or disorder tending to shorten life ; that the above statement of my age, health, and other particulars, is true ; and that I have not withheld or concealed any circumstance tending to render an assurance on my Life more than usually hazardous ; and *We, the Trustees of the Britannia Life Assurance Company*, (the parties in whose

Foster v. The Mentor Life Assurance Company.

favor the Assurance is to be granted,) do hereby agree that this Declaration shall be the basis of the Contract between *us* and the Mentor Life Assurance Company; and that if any untrue averment is contained in this Declaration, or in the answers above given, all sums which shall have been paid to the said Company upon account of the Assurance made in consequence thereof shall be forfeited, and the Assurance be absolutely null and void.

Signed at this *twenty-first* day of *November* in the year of our Lord *One* thousand eight hundred and *fifty-one*.

Signature of Party whose life

is to be Assured, _____

Signature of Party in whose favor

Policy to be granted, _____

Witness : _____

Those parts of the above document that are in Roman characters were in the original printed. It was admitted that the parts of it which are printed in italics, (with the exception of the words "E. R. Foster, Resident Director,") and the bracket uniting several questions, were written upon it before it was sent from the Mentor Life Assurance Company's office to that of the Britannia Mutual Life Assurance Company, having been filled up by some of the clerks in the Mentor Life Assurance Company's office. The words "E. R. Foster, Resident Director," were written across it by Mr. Foster, the nominal plaintiff, who was, in fact, the resident director; and then it was sent back to the Mentor Life Assurance Company. It was not very clear on the original whether the bracket was intended to include the sixth and nineteenth questions, as well as those between them or not; but nothing turned upon this. The four other papers were, *mutatis mutandis*, similar, but relating to the other four lives. The Britannia papers, of which copies were attached, were the papers on which the original insurances were granted.

The original policy on the life of Count D'Orsay had been granted in 1845. Amongst the papers relating to it was a paper of questions very similar to those above set out, to which were answers signed by Count D'Orsay, and by the original insurer, and there was also a report by the medical referee of the Britannia Life Assurance, on the state of the Count's health. These gave a most favorable account of his health and constitution. On the face of them all these papers represented the state

of things in 1845, when the original policy was granted. It was not disputed that, in 1845, and down to a short time before November, 1851, Count D'Orsay had been a remarkably eligible life, and that both parties supposed that he still continued so. But, in fact, before 21st November, 1851, the Count was already suffering under a mortal disease, of which he afterwards died. The defendants accepted the five reassurances proposed to them, and they executed five deeds-poll. These were printed forms, the blanks of which were filled up.

The policy on Count D'Orsay commenced: "Whereas, [William Bridgett, John Drewett, and James Foster, trustees of the Britannia Mutual Life Association, Princes Street, in the city of London,] the persons assured by this policy, are desirous of effecting an insurance with the Mentor Life Assurance Company upon the life of [Gaspard Gabriel Gillion Alfred Count D'Orsay] in the sum of [£1,500]. And the said assured have caused to be delivered into the office of the said company a declaration or statement, in writing, signed by them, bearing date the [21st day of November last], thereby setting forth the age and the past and present state of health, and other circumstances touching the habits of life of the said person on whose life the assurance is effected, which declaration, so far as it respects the age of the said person, is hereby admitted to be correct, and the said assured have agreed that the said declaration shall be the basis of the contract between them and the said company." The parts between [] were filled up in writing; the rest was printed. It is unnecessary to set out the rest of the instrument, the effect of which corresponded with that set out in the declaration.

The Mentor Life Assurance Company then received payment of the five premiums, amounting in the whole to £649 10s. 10d., in one check.

After the Count's death, it appeared that, in November, 1851, his life was not insurable. The defendants resisted payment on the ground that the paper signed by Mr. Foster, above set out, amounted, in legal effect, to a declaration by the assured, on 21st November, 1851, as to the then present state of health of the Count. At the trial, both sides examined witnesses as to a supposed custom, in cases of reinsurance, to confine the warranty on the part of those reinsuring to the state of health at the time of the original insurance, and to leave the reinsurers to inquire for

Foster v. The Mentor Life Assurance Company.

themselves as to whether it had continued unaltered. The evidence on this head did not amount to much, as reinsurances of this kind did not appear to be common; but there was some evidence of such custom.

The LORD CHIEF JUSTICE expressed his opinion to be that the question whether the paper of November, 1851, was a signed statement, as averred in the plea, was not a pure question of law for the judge. He gave the defendants leave to move to enter a nonsuit if there was no evidence; and directed the jury to find a verdict for the defendants if they believed that the intention of the parties was that the paper of 21st November, 1851, was to be understood as a statement, on the part of the insured, that Count D'Orsay was at that time in good health; but that they should find for the plaintiff if they thought the intention was that the paper was to be understood as a statement, on the part of the assured, that the state of health of the Count, at the time the original policy was effected, was shown by the Britannia papers, to which the defendants were referred, and that the defendants might make any further inquiries they pleased.

He directed them, in framing their verdict, to consider the whole of the circumstances; the evidence of custom as to reinsurance; the form of the policy, which was partly printed, partly written; the manner in which the printed proposal had been filled up before Mr. Foster affixed his name; the way in which that name was, by the bracket, apparently confined, as a signature, to the reference to the Britannia papers; and the fact that there were several blanks not filled up. He expressly told them that if the question was one of law, their finding would be reviewed, but that if it was one of fact, their verdict would be final; at the same time he did not conceal that, in his opinion, the weight of evidence was much in favor of the plaintiff. Verdict for the plaintiff.

Sir *A. J. E. Cockburn*, attorney general, in last Michaelmas term, obtained a rule nisi to enter a nonsuit, pursuant to the leave reserved, or for a new trial on the ground of misdirection, or that the verdict was against the weight of evidence. In the same term,

Willes showed cause. The only question at the trial was whether there was a warranty, on the part of the plaintiff's company, that Count D'Orsay was in good health in November, 1851.

The plaintiff disclaims making any point on the ground that the whole directors or trustees do not sign: the company agree that whatever Mr. Foster, the managing director, warranted or signed, is to be taken as if warranted or signed by the whole directors or trustees. The question is therefore reduced to this: Whether the paper of 21st November, 1851, was a warranty by Mr. Foster that Count D'Orsay was then in good health.

It is urged that the policy is conclusive in this matter; but that is not so. The recital there is, that there was a declaration in writing. The first inquiry, in all cases in which a written document refers to something extrinsic, is what is the particular thing referred to; a question to be answered by evidence. In the present case there can be no doubt that the recital referred to the paper which has been produced in evidence. Then comes the question, What is the nature of the thing referred to? That depends, not upon the description contained in the referring document, but on the thing itself. If it answers all the description, it is well; if not, the inaccurate parts of the description are *falsa demonstratio*, and as such must be rejected. Here *constat de documento*: the paper is the one produced. Does it answer all the description in the policy? That is, is it signed by the assured, and is it touching the then present state of health of Count D'Orsay, or is there misdescription in these respects? To answer that, the paper itself must be looked to. If there had been no name at all attached to the paper, it could not have been said that the recital proved that it was signed. There is here a name attached; and the question is, whether that was a signature to the whole paper or not. And the first point is, whether that was a question for the court or the jury. It may be admitted that a name attached to a written instrument is, *primâ facie*, to be taken as a signature authenticating the whole of what appears on the face of the instrument; but it cannot be doubted that a name may be legally applied as the signature to part only; and, on the face of this instrument, the name, written as it is at the foot of a particular sentence, "For these particulars, see copies of Britannia papers attached," purports to be intended to apply to the reference, and to that only. If it does not so purport, it is at the least an imperfect and ambiguous instrument, and the intention to affix the name as a signature to the whole is not clear. That is enough to make it a subject of inquiry, by means of circumstances *dehors* the instrument, what Foster intended to sign, — which must be a

Foster v. The Mentor Life Assurance Company.

question for a jury. In *Wigglesworth v. Dallison*, 1 Doug. 201, and a long series of cases collected in Mr. Smith's notes to that case,¹ it is established that a custom of trade is admissible as evidence to explain or add incidents to an imperfect document. It was therefore admissible in the present case; and, it having been received, there could not be a nonsuit, as the effect of it was for the jury. *Moore v. Garwood*, 4 Exch. 681. If there was a question for the jury, it could be no other than the one put.

As to the verdict being against evidence: Any one looking at the whole circumstances would come to the conclusion to which the jury has evidently come, viz.: that the printed forms were irregularly used in a transaction to which they were not applicable. It is a strong fact, that if there was a declaration that Count D'Orsay was in good health, there was also a declaration that the Duke of Beaufort was in good health; for the same form was used in his case. Yet in the Duke of Beaufort's case £20 per cent. premium was paid, because he was known not to be in good health.

It is said that the recital in the policy operates as an estoppel on the plaintiffs. It must be admitted that if it appears that the parties have agreed to proceed on a contract that some fact shall as between them be considered to exist, and that they shall act on the faith of that agreement, there is an estoppel. And such an agreement may be shown by a recital. But in the present case the recital by the defendants, in their own deed, does not show that the assured, who are not parties to the deed, ever agreed that a declaration should be taken as made; and unless the defendants can go so far as to say there was such an agreement, there can be no estoppel.

Sir *A. J. E. Cockburn*, attorney general, & *C. W. Wood*, *contra*. The recital in the policy is that there has been a signed declaration touching the Count's present health, which the assured have agreed to take as the basis of the contract. The assured receive that policy with that recital, pay the premium, and induce the defendants to become assurers on the faith that this recital is acceded to. They are therefore concluded from denying that there was such a declaration. *Pickard v. Sears*, 6 A. & E. 469. If their conduct was not absolutely conclusive, it was at least so nearly conclusive, that the verdict is against evidence.

¹ 1 Smith's Leading Cases, 305.

Supposing the question to be open, it was a question for the judge, not for the jury. A signature may be written in any part of a document, and yet apply to the whole. *Knight v. Crockford*, 1 Esp. N. P. C. 190; *Saunderson v. Jackson*, 2 B. & P. 238.¹ That being so, the judge, as a matter of law, ought to have decided that the signature of Foster applied to the whole. It was therefore a misdirection to leave anything to the jury.

Cur. adv. vult.

In this term, (January 30th,) the court being divided in opinion, the learned judges delivered arguments *seriatim*.

WIGHTMAN, J. This was an action by the plaintiff, representing the Britannia Mutual Life Association, against the defendants, upon a policy of assurance upon the life of Count D'Orsay. The declaration was in the usual form, reciting the policy, and that the trustees of the assured had caused to be delivered into the office of the defendants a declaration in writing, *signed by them*, setting forth the age, and past and present state of health, and other circumstances, touching the habits of life of the person on whose life the assurance was to be effected; and that, if anything averred by the said trustees in the said declaration was untrue, the policy should be null and void. It was then averred that the said trustees did not in any manner declare to the defendants, in any declaration in writing or otherwise, anything that was untrue. The defendants pleaded that the trustees *did declare to the defendants*, in the declaration mentioned in the policy, something that was untrue; that is to say, *that at the time of delivering the said declaration into the office of the defendants, the said Count D'Orsay was in a good state of health*; and issue was taken upon the allegations in the plea.

There was no doubt but that, at the time the declaration was delivered at the defendant's office, Count D'Orsay was *not* in good health, but was affected by the disease of which he died soon after; and the only question at the trial was, whether the trustees, in the declaration mentioned in the policy, represented Count D'Orsay to be *then* in a state of good health, that is, at the time of delivering the declaration to the office of the defendants. It appeared by the evidence at the trial, that the declaration referred to in the policy was not in fact signed by the trus-

¹ See *Lobb v. Stanley*, 5 Q. B. 574.

tees, but by the plaintiff, who was the Resident Director of the Britannia Mutual Life Association. It was, however, hardly disputed but that Foster was the agent of the trustees for the purpose of the declaration, and that what he did and signed upon that occasion bound the Britannia Mutual Life Association and the trustees, as fully as if they had acted and signed themselves. Assuming, then, that the signature of Foster pledged the company as completely as if the trustees had themselves signed the declaration, the question is, what did Foster sign, and to what did he pledge the trustees and the Britannia Mutual Life Association? The document, which is called a declaration, is in two parts: the first being a series of nineteen questions to be answered by the persons to be assured; and the second a declaration to be made by the person whose life is to be insured, that he is, *at the time of making the declaration*, in a good state of health; with a further declaration by the parties to be assured, that if the preceding declaration or their answers to the questions be untrue, the insurance will be void. Both parts of the document are on the same side of one sheet of paper. The assurance proposed to be effected by the Britannia Mutual Life Association with the defendants was in fact a reinsurance, the Britannia Company having, in 1845, granted a policy of assurance upon the life of Count D'Orsay to a larger amount than that which they proposed to assure with the defendants. When the proposition to assure was made, the defendants sent to the Britannia Mutual Life Association the document in question, partly filled up by themselves; they had, from their own knowledge, given the answers to the first five questions; but the twelve following questions were included in a circumflex, against which was written, at the side of the paper, "For these particulars, see copies of Britannia papers attached;" and, at the foot of these words, the plaintiff Foster signed his name, but nowhere else. The blank, left for the signature of the person whose life is to be insured to the declaration to be made by him, was not filled up, nor was it signed by Count D'Orsay; nor was the blank left for the signature of the party to be assured, vouching for the truth of the declaration and of the answers to the questions, filled up, but remained in blank, as when sent by the defendants to the plaintiff's office. The real question upon the issue was, whether the Britannia Mutual Life Association had,

in the document referred to in the policy, represented Count D'Orsay as being in good health *at the time of delivering that document to the defendants*. But, to determine this question, it seems to have been considered necessary to determine a previous one, namely, whether the party signing the document intended his signature to be to the whole, or only to the part against which it was placed; and this was the question, in substance, which was left to the jury; and the point now to be determined by us is, whether, in our own opinion, there was any misdirection in the manner in which that question was left to the jury, or in the leaving it to them at all.

The defendants, by the recital in the policy, show that they consider that the trustees, by the signature of Foster in the place where it was in the document, did make a declaration as to the *then existing state* of health of Count D'Orsay; and, as the Britannia Mutual Life Association accepted the policy with that recital in it, without denial or explanation of it, and the action is brought upon the very instrument containing the recital, one question, and that a most important one in this case, is, whether they are not bound by it, and concluded from denying now that they did make a declaration of the then present state of Count D'Orsay's health. The document referred to, if the signature is to be taken as applicable to the whole, is not incapable of such a meaning; and, if it may be so construed, and the Britannia Mutual Life Association have, by allowing the defendants to deal with them as if it was to be so construed, assented to such construction, and by means of it have obtained that which the defendants might not otherwise have been disposed to give them, it appears to me, upon the principle of the decision of *Pickard v. Sears*, 6 A. & E. 469, and some later cases founded upon it, that the Britannia Mutual Life Association are, *primâ facie*, concluded, and cannot be allowed now to deny that they did mean the declaration to apply to the existing state of Count D'Orsay's health, or that the signature by Foster applied to the whole document. But though in some sense the Britannia Mutual Life Association may be said to be concluded by the recital, it is not an estoppel, nor a conclusion in point of law; it may have been founded on mistake, or be capable of explanation; and I do not think that there is enough to warrant a rule absolute for a nonsuit. But it appears to me that the circumstance

of the Britannia Mutual Life Association having accepted the policy with that recital, was not sufficiently, if at all, pressed upon the attention of the jury; and that upon that ground, and without reference to the other points taken upon the motion for the rule, there should be a rule absolute for a new trial.

ERLE, J. Assuming the pleadings and evidence to be as stated by my brother Wightman, I have come to the conclusion that the plaintiffs' case failed at the trial on several grounds.

As he sues upon a written contract, he is a party to it, as much as if he had signed it, and cannot by parol evidence contradict or alter the stipulations therein. In that written contract, namely, the policy, it is stipulated that the plaintiffs had delivered in to the defendants a declaration in writing, setting forth, *inter alia*, the present state of Count D'Orsay's health, and that, if the declaration was untrue, the promise of the defendants was void. The parol evidence was offered to show that the plaintiffs had not delivered in to the defendants any such declaration in writing, so setting forth the present state of the health of Count D'Orsay. It seems to me that the attempt was thereby to contradict the written agreement, and to alter the promise of the defendants from conditional to absolute. The question of signing is only material to identify the alleged declaration. When the paper containing it was identified, the question of signature was not of the essence of the stipulation; but the question of such a declaration so setting forth the present state of Count D'Orsay was material, and could not be denied by the plaintiffs.

If the stipulations are changed into the form of an executory agreement, the declaration might run thus: "In consideration that the plaintiff would deliver such a declaration, and would undertake it was true, and would pay a premium, the defendant promised to insure." The plaintiff could not recover on such a contract, without averring that he had delivered such a declaration, and that it was true; and if the stipulations of the deed are analyzed, the delivery of such a declaration will appear to be equally indispensable for the plaintiff; and if he delivered none such, the defendants' promise did not attach, and the plaintiff would fail.

Supposing this ground not to be tenable, I am further of opinion that the plaintiffs were concluded from setting up at the trial that they had not made such a declaration. The defendants sent

to the plaintiffs for signature such a declaration, so setting forth the state of Count D'Orsay, and received it back with a signature at the side ; and the defendants recited in their contract that the plaintiffs had delivered in such a declaration, and that they acted on the fact so recited ; and they promised only on condition it was true. The plaintiffs, by accepting that promise, induced the defendants to act on the belief that the declaration had been so delivered in as recited ; and plaintiffs obtained the deed by reason of that belief ; then, in claiming a benefit under that deed, they are concluded from denying the fact which the defendants informed them was the basis of their promise. The case of *Pickard v. Sears*, 6 A. & E. 469, and many cases founded thereon, have carried this doctrine much further than is required for the purpose of the present defendants. The effect of the words "concluded from denying," has never been settled. Perhaps the effect is that the principle ought to be explained to the jury, and they should be told as matter of law that, as against the party who authorized the belief, they are bound by law to find the fact to be as the opponent under the supposed circumstances believed, and if they found otherwise to set aside the verdict. But whatever be the correct mode of acting on that principle, it was not brought forward at all on the trial.

I would further observe that the evidence of other contracts made by other offices was inadmissible, as irrelevant towards proving the meaning of the contract made between these parties. The contracts which other offices have made are not evidence against the Mentor to prove this contract. If it be admitted, none would seem to be at all applicable except reassurances after an equal interval from the original assurance, as of course the probability of an alteration in the risk, and the need of a fresh declaration, is in direct proportion to the length of that interval. Of such reassurance there was to my mind very little satisfactory evidence.

After the course pursued at the trial, I am not prepared to say that a nonsuit should be entered now, though it appears to me that the only two questions for the jury must be answered for the defendants, and the construction of the written instruments must also be in the defendants' favor. But I am of opinion that the verdict for the plaintiffs ought not to stand, and that therefore the rule for a new trial should be absolute.

Foster v. The Mentor Life Assurance Company.

COLERIDGE, J. In this case three points are made for the defendants: First, that they were entitled to enter a nonsuit. Secondly, that the jury were misdirected. Thirdly, that the verdict for the plaintiff is contrary to or against the weight of evidence. It is necessary, with a view to the decision on each of these points, to look to the declaration and issue as well as the evidence in the cause.

It is an action by the trustees of the Britannia Mutual Life Association against the Mentor Life Assurance Company, to recover upon a policy effected by the former with the latter, on the life of Count D'Orsay. In the declaration, stating that such policy had been effected, the plaintiffs state that it was therein recited that they had caused to be delivered into the defendants' office a declaration or statement in writing signed by them, bearing date 21st November then last, setting forth the age and past and present state of the Count, and other circumstances touching his habits of life; and that they had agreed that the said declaration or statement should be the basis of the contract between them. The declaration also sets out a provision in the policy, that if anything averred by the trustees in the alleged declaration so recited, and alleged to have been made by them, was untrue, the policy should be null and void. The declaration also contains an averment that the said trustees did not, nor did the said Britannia Mutual Life Association, aver or declare to the defendants anything that was untrue, in any declaration in writing, or otherwise howsoever.

The defendants plead that the trustees and the association did aver and declare to the defendants, in the said declaration mentioned in the said policy as agreed to be the basis of the said contract, something that was untrue, that is to say, that at the time of the delivery of the said declaration into the office of the defendants, the said Count D'Orsay was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas he was not then in a good state of health, but was then afflicted with a disease and disorder tending to shorten life. The plaintiff takes issue on the whole plea.

Three questions are involved in this issue: Did the trustees deliver a signed declaration? Did that declaration state Count D'Orsay to be at the time of such delivery in a good state of health, free from any disorder tending to shorten life? If such declaration were delivered containing such statement, was that

statement true ? And it is not denied that in fact it was untrue : so that the substantial questions for determination at the trial were reduced to the first two.

Upon the trial it appeared that the policy in question was one of reinsurance effected in December, 1851, for £1,500, the original policy for a larger amount having been effected in 1845. That this was one of five policies of reinsurance offered to the defendants together, all or none to be accepted, on five several lives. Some parol information was given as to each, and the Count's was represented as a notoriously first-class life. It was shown that the defendants had given to the plaintiff a paper headed in the upper part, "Proposal for Assurance;" in the lower, but on the same side, "Declaration." The part headed "proposal" contained nineteen questions with blank spaces left for the answers; these questions were the ordinary ones, as to the age, condition, health, past and present, the having or not having had certain specified disorders, the habits and medical attendant of the life to be insured, the having or not received recently advice from any other person, and required the name and residence of some intimate friend. To the first five questions, which had no reference to health or habits or medical advisers, specific answers were given on the paper; all the succeeding questions, excepting the last as to the intimate friend, appeared to have been inclosed within a circumflex; and across the blank space opposite them was written, "For these particulars, see copies of Britannia papers attached;" and, under this, came the signature of the plaintiff, "E. R. Foster, Resident Director, 21st Nov. 1851." No answer was given to the nineteenth question. Under the part headed "Declaration" came first a statement with a blank which was filled up in writing with the words, "Count D'Orsay," and which purported to be a declaration by him that he was then in a good state of health, and was not then afflicted with any disease or disorder tending to shorten life; that the above statement of his age, health, and other particulars was true, and that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous. Secondly followed, "And we, the trustees of the Britannia Life Assurance Company," "agree that this declaration shall be the basis of the contract between us and the Mentor Life Assurance Company; and that if any untrue averment is contained in this declaration,

Foster v. The Mentor Life Assurance Company.

or in the answers above given," the assurance shall "be absolutely null and void."

Then came the words :

"Signed at _____, this 21st day of November, in the year of our Lord, 1851.

"Signature of party whose life is to be assured. _____

"Signature of party in whose favor policy is to be granted. _____

"Witness : _____"

None of these blanks were filled up. The defendants contend that this paper, upon admission of the plaintiff's handwriting, and of its delivery to the defendants, presented no question except for the judge, and that he was bound so to construe it that a nonsuit thereon ought to have been entered, or a verdict for the defendants, upon these grounds, substantially, that it being immaterial on which part of a paper the party to be charged by it signs his name, the plaintiff's signature must be taken conclusively to apply to the whole paper ; and that the reference to the Britannia papers attached did not import that they were to be looked to only to ascertain what the state of Count D'Orsay's health and habits were in 1845, when they had been given, but brought down those answers to the then present time.

Now, as to the first of these points, I apprehend it cannot be laid down, simply and without qualification, that it is immaterial in what part of a paper you find the signature of the party to be bound by it. It is rather true to say that, if you find it at the foot of the matter written, it is to be taken conclusively to apply to the whole, unless there be something expressly to rebut that presumption ; and that, if you find it anywhere else, it *may* apply to the whole, if upon the evidence you find that the party signing so intended. Where the intention to sign is found, and the signature is so placed as apparently to apply no more to one part than another, there can be no reason *prima facie* to consider it otherwise than as intended to apply to the whole ; but where the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion is still purely one of intention. Now, wherever that question arises, it must be for the jury. These principles, I think, may be collected from the decisions on the statute of frauds both as to wills and contracts. Thus, in *Right, lessee of Cater, v. Price*, 1 Doug. 241, where a testator had

signed the two first sheets of his will, and attempted to sign the third, but from weakness could not do it, this was held no execution. Lord Mansfield said that the testator, "when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole." But in *Winsor v. Pratt*, 2 B. & B. 650, where a will on one sheet concluded by stating that the testator had signed his name to the two first sides and put his hand and seal to the last side, and he did put his name and seal to the third side at the end of the will, but did not sign his name to the two first sides, the court, supporting the execution, recognized the preceding case, and distinguished it. "There," said Dallas, C. J., "the *intention* of the testator was defeated by incapacity; here, the act of the testator points to nothing prospective; and whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention." Again, in *Johnson v. Dodgson*, 2 M. & W. 653, the defendant, being the buyer of hops, wrote in his own book a *sold* note beginning, "Sold John Dodgson;" and this, at his request, the seller's traveller signed. In an action for goods sold and delivered, this was held a good signature by the party charged, Lord Abinger saying: "The cases have decided that, although the signature be in the beginning or the middle of the instrument, it is as binding as if at the foot of it; the *question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.*" The cases in which a printed name has been held a good signing are to be supported on the same principle; and the intention is inferred from the habit, or from other circumstances to be found in them. If then this was a question of intention, and there was any evidence of intention, the learned judge could not properly withdraw it from the jury; and it seems to me that there was such evidence in the circumstances of the whole transaction. For this was not an ordinary case. Five lives were offered in the lump: one was confessedly a bad life; with regard to three some special information was afforded; and as to one of these, Mr. Brooke, his absence precluded the ordinary references. As to the life in question, he was honestly represented as so notoriously good a life, that the ordinary inquiries may well have been deemed

unnecessary. He, too, was abroad ; and it was probable he would not have troubled himself to answer questions, having no interest in the policy being effected. Altogether it was a case of circumstances from which a jury was to determine whether there was an intention by the signature, found where it appeared on the paper, to sign and be bound by the whole instrument. In the light in which I view the case, as standing on its own peculiar circumstances, I do not rely on the evidence of usage. It seems to me rather that it was not one on which the evidence was admissible ; and the evidence in fact admitted appears to me to have amounted to nothing of any substance. But this is not material upon the present rule, the first ground for which I think fails for the reasons given.

Secondly, as to the direction. Supposing the question of signature to have been for the jury, I do not see how it could have been properly left to them, except as one of intention, to be collected from the paper itself, and all the circumstances stated by the witnesses ; and this I understand to have been in substance what was done at the trial. It is not inconsistent with this, that a question of construction as to part may have been mixed up, as to which the judge was to give his opinion ; and if he gave the jury what appears to us a wrong opinion, that might amount to a misdirection. On more grounds than one, it was certainly important for the jury to know what was the meaning of the answer to the questions included within the circumflex. Did it relate to the Count D'Orsay's state in 1845, or in 1851 ? Undoubtedly the words may admit of either interpretation. The learned judge thought that the former was the true one ; and after much consideration and some doubts, I am not prepared to say that he was wrong. It is impossible, I apprehend, to form an opinion upon this without reference to the circumstances under which the words were used. These do not lead me to believe that the plaintiff intended to warrant a continuance, at the date of this policy, of all those particulars stated in the answers of 1845, but only that the particulars were true at the time when they were stated. Upon the general question whether the whole paper was signed, it was objected that the learned judge spoke too decidedly. Seeing nothing wrong in the opinion he expressed, that would be no objection with me, unless he thereby took the matter out of the hands of the jury ; but according to the notes,

that cannot be said. He gave his opinion, but put all the facts before them for their consideration.

It only remains upon this point to consider whether the circumstances precluded the plaintiff from denying a signature of the whole paper in the sense contended for by the defendants. If they did, the direction was not right. I am clearly of opinion they did not. And this must follow from the conclusions to which I have already come. The argument for the defendants on this point is to this effect: The policy, on which the plaintiffs' claim rests, recites that the plaintiffs have caused to be delivered to the defendants a declaration in writing, signed by them, setting forth the past and *present* state of health and other circumstances touching the habits of life of the Count D'Orsay: these words are the words of the defendants; but they show their understanding of the transaction; the plaintiffs allow them to use them; and, on faith of this, the defendants enter into the contract. The plaintiffs, therefore, cannot now deny that such declaration was made. I should be very sorry to do anything that should break in upon the wholesome principle laid down in *Pickard v. Sears*, 6 A. & E. 469; but it seems to me that it would be going much beyond that principle if we were to apply it to the facts of this case. What are they? I must now assume that *no such* declaration was in fact made, and that the plaintiffs' proposal for insurance has been accepted on the faith of a different declaration, limited in its extent, and not signed at all; that this fact is known to the defendants as well as to the plaintiffs; and this being so, that the defendants, in the printed part of a policy, using the ordinary words of such policy, knowingly or with means of knowledge, misrecite the plaintiffs' declaration, which misrecital the plaintiffs pass over, accept the policy as worded, and pay the premium. I am not supposing that the binding parts of a policy are to have less effect when printed than when written; but in applying a principle, the foundation of which is natural equity, all the facts of the case are to be looked to, and this is one of them. Now, upon these facts, it seems to me that it would be unjust and unreasonable absolutely to conclude the plaintiffs from denying the truth of this recital. It would be applying a principle, framed to advance the ends of justice, in exactly the opposite direction. The permitting the misrecital to pass without objection, is an argument fairly to be

used for the defendants against the plaintiffs' construction ; but it is no more, and in my opinion not strong enough to weigh down all the opposing argument.

Upon the remaining question — the propriety of the verdict — I need say nothing in addition to what I have already said on the former points. From this it follows that at least I cannot consider the verdict one which the court should interfere to set aside. I think therefore the rule ought to be discharged.

Lord CAMPBELL, C. J. I am of opinion that this rule for entering a nonsuit ought to be discharged.

The issue was, whether the plaintiff's company did aver and declare to the defendants, in the declaration mentioned in the policy, that at the time of the delivering of the said declaration into the office of the defendants, Count D'Orsay was in a good state of health, and not affected with any disease likely to shorten life. The fact was admitted that, unknown to both parties, Count D'Orsay, when the policy was executed, was affected by a disease likely to shorten life ; and the verdict depended upon the proof of the alleged guarantee that he was then in good health.

I conceive that the defendants were bound to produce the document referred to in the recital of the policy, and to show that, by this document, the Britannia Mutual Life Association did give the alleged warranty. If this had depended upon the mere construction of the document, it would have been a pure question of law, and the judge, upon its being produced and proved, ought to have directed how the verdict should be found, or that the plaintiff should be nonsuited. But looking at the document, a question of fact arises, whether that part of it which is supposed to contain the guarantee is to be considered as signed by the assured. I cannot think that the recital by the defendants in the policy, that it was so signed, is binding on the assured. Suppose that no signature had appeared upon any part of it, and that it had been a mere printed form, with none of the blanks filled up, surely the plaintiff would not have been precluded from contending that it was not signed, or from showing that the defendants had agreed to take upon themselves the risk of Count D'Orsay's continuing an insurable life. It seems to me, that the doctrine of estoppel does not apply to such a transaction, and that we are bound to see whether in truth the declaration was signed by the directors, and what it imports.

Looking to the document itself: in the place for "signature of party whose life is to be assured," no signature appears; and in the place for "signature of party in whose favor policy to be granted," no signature appears. On another part of the document there is the signature of one of the directors; but I think it is impossible to say, as a matter of law, that the signature applies to that part of the document which contains the undersigned declaration in the name of Count D'Orsay. If it had been a question for the judge, I should certainly have said that Foster's signature did not apply to this, and that the document, as it stands, would have no more effect than if that part of it entitled "*declaration*" had had none of the blanks in the printed form filled up in writing, or if this part of the document had been entirely wanting. From the place where Foster's signature is found, and the circumflex denoting to what it does apply, with the words above the signature, "For these particulars, see copies of Britannia papers attached," I should infer that the proposed guarantee as to the present state of health of Count D'Orsay was repudiated by the Britannia Mutual Life Association, and that the directors of the Mentor Company, after having examined the papers showing Count D'Orsay's state of health when the original policy was effected, were left to draw their own conclusions as to his present state of health, and to take the risk of the Count's health continuing good down to the date of the new insurance. Considering the doubt as to whether the declaration be signed as the defendants allege, I likewise think that some regard may be paid to the evidence of usage upon a reinsurance. This was not objected at *nisi prius*, nor upon the motion for a new trial; and if admitted, the jury were to determine what effect it was entitled to. An observation has been made that the evidence was only parol, and that the policies referred to by the witnesses were not produced. But it has often been held that, although the contents of a particular document cannot be proved without its being produced or accounted for, a mercantile usage, which refers to written documents, may be established by parol evidence; and, indeed, it could hardly be proved satisfactorily in any other way. Moreover, I conceive that the evidence, given on both sides, of the conversations and conduct of the parties while the transaction was going forward, might be taken into consideration in determining whether the declaration was intended

to be, and was understood between the parties to have been, signed by Foster. If there was any parol evidence, on which the issue was to depend, then, according to the well known rule clearly stated by Patteson, J., in delivering the judgment of the exchequer chamber in *Moore v. Garwood*, 4 Exch. 681, the whole was for the jury. I do not know any principle or practice according to which, in this case, the signature of the declaration should have been left to the jury as a separate issue. No question arose, or could arise, for the judge upon the construction of the declaration; for if it was signed by the trustees of the Britannia, it amounted, and was admitted to amount, to an express warranty, in the very words of the plea, that Count D'Orsay was, on the 21st day of November, 1851, in good health, and was not then afflicted with any disease tending to shorten life. The doctrine of *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cook*, 2 Exch. 654, which we have lately had to consider in *Howard v. Hudson*, 2 E. & B. 1, would have effectually estopped the Britannia Company from denying that they had given the warranty if they had stated that they had signed the declaration; for then they would have made a statement on which the Mentor Company had acted, and thereby incurred a liability to their prejudice. But if the declaration was repudiated instead of being signed, there had been no statement by the Britannia Mutual Life Association which could be the foundation of such an estoppel; for the recital in the policy is a statement by the Mentor Company only; and if the declaration was not signed by the directors of the Britannia Mutual Life Association, nor understood so to be, the Mentor Company cannot have acted upon any such belief. Indeed, they knew full well that Count D'Orsay was then abroad, and that there never was any contemplation of his signature being affixed to it; and this was a preliminary to the signature by the party in whose favor the policy was granted. At the trial, the defendants attempted to prove that they granted the policy on the credit of a parol declaration by one of the Britannia Directors that "Count D'Orsay was a notoriously good life." I am therefore of opinion that the issue resolved itself into a question of fact for the jury, and that we cannot direct a nonsuit to be entered, according to the leave reserved, if the court should think that the judge ought to have directed a nonsuit at the trial.

It is next contended that there was misdirection in the manner of leaving it to the jury ; chiefly on the ground that the judge used the expression that " the declaration was not signed by the trustees." But, in using that expression, he only gave the jury to understand that no signature was found where it ought regularly to have appeared ; and when the attorney general interposed during the summing up, suggesting that the writing of Mr. Foster, across the document, must be taken to be a signature of the declaration, the judge (according to the short-hand writer's note) observed : " I do not think so, because Mr. Foster has only signed '*For these particulars, see copies of Britannia papers attached ;*' but the jury shall see the whole." Accordingly, facsimile copies of the whole paper, entitled " Proposal for Assurance," were put into the hands of the jury ; and their attention was directed to the different parts of it, so that they might form a proper opinion whether the signature was intended, and understood between the parties, to apply only to a part or to the whole. The signature therefore was left, with the other facts in the case, for their consideration. Nor was any question of law left to the jury which the judge ought to have determined ; for they were not called upon to construe a written document, or to pronounce upon the intention of the parties from the language used.

If it be alleged that the supposed estoppel, or conclusive admission, ought to have been submitted to the jury, I answer that no such point was made at the trial, and that if it had I think it could not be supported.

The ground of misdirection therefore seems to me to fail.

The remaining question for our consideration is, whether the verdict was contrary to the evidence ? In my opinion it was entirely according to the evidence, and according to the justice of the case. All imputation of fraud was disclaimed by the defendants ; and looking both to the written document and the parol evidence, I think the defendants, as far as the policies on Count D'Orsay and three others were concerned, were content to take these lives on the papers on which the former policies upon them had been effected, at the ordinary premium, according to the ages which they had respectively attained, with that on the Duke of Beaufort's life at the extraordinary premium of £20 per cent. ; receiving, in one check for £649 10s. 10d., the premiums on all the five for the first year, and being satisfied to run the risk of

 Moore v. Woolsey.

any of the four lives having become less eligible than when the original policies were effected, by circumstances unknown to either party.

If the defendants had expected the warranty, one would imagine that they would have objected to the declaration when it was returned unsigned, and would have required it to be signed as upon an original insurance, before they executed the policy. The mere circumstance of their having used the printed form of policy adapted to an original policy, with the printed recital that the declaration had been signed by the assured, is not at all sufficient to induce me to infer that they believed they had obtained a warranty, such as would have been given by regularly signing such declaration as those upon which the original policies had been effected. In construing a policy of insurance, the court certainly cannot consider whether it be in writing or in print, or partly in writing and partly in print; but I think that the jury, in determining the fact, whether the declaration was understood between the parties to be signed according to the recital, would have been perfectly justified in taking into consideration that this policy was in a printed form adapted to an original insurance, and not to a reinsurance.

Upon the whole, I am of opinion that a special jury of the city of London, gentlemen more familiarly acquainted with such transactions than we are, have arrived at a right conclusion, and that their verdict ought not to be disturbed.

The court being equally divided in opinion, the rule dropped.

ANNA MARIA MOORE & JOHN LUCENA MOSS KETTLE, executrix and executor of Arthur Moore, *vs.* O'BRIEN BELLINGHAM WOOLSEY & JOHN KNILL.

(4 El. & B. 243. Queen's Bench, 1854.)

Death by suicide. Interest. — Declaration, by the executor of M. against the directors of a life assurance company, alleged that M. insured his life for £999, by a policy containing conditions: viz. (8.) "Policies effected by persons on their own lives, who shall die by duelling or by their own hands, or by the hands of justice, will become void so far as regards the executors or administrators of the person so dying, but will remain in force only to the extent of any *bonâ fide* interest which may have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as a se-

curity for money, upon proof of the extent of such interest being given to the directors to their satisfaction ;" (9.) "If a person who shall have been assured upon his own life for at least five years, or shall have paid a sum equivalent to at least five years' annual premiums, shall die by his own hands, the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay, for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy, if it had been surrendered on the day previous to his decease ; provided the interest in such assurance shall be in the assured, or in a trustee for him, or for his wife or children, at the time of his decease." The declaration then averred M.'s death, and that defendants had not paid. Plea: that M. died by his own hands. Replication: that before M.'s death, K. acquired a *bonâ fide* interest in the policy by actual assignment by way of security for money, within the meaning of the conditions ; and proof of the extent of such interest was, before action, given to the directors of the company to their satisfaction. Held bad, on demurrer, for not showing an assignment by deed. Further replication : that, before the death of M., K. acquired a *bonâ fide* interest in the policy by virtue of an equitable lien as a security for money ; and proof of the extent of such interest was, before action, given to the directors to their satisfaction. Issue being taken on this replication, the facts were stated in a case giving to the court the same power to draw inference of fact as a jury.

From the case it appeared that M., before his marriage, had given a bond, conditioned to secure £5,000 to his wife ; that, not being able to do so, an agreement was made among the family, by which, *inter alia*, M. was to insure his life for the benefit of his wife, she paying the premiums out of her own separate income ; in pursuance of which he effected the policy and handed it over to K. for the benefit of the wife, intending to assign it regularly ; that no assignment was executed ; but the policy remained with K. as trustee for the wife, to M.'s death. These facts were communicated to the directors. Held, that this supported the issue on the part of the plaintiffs ; that it was not necessary to show, by express evidence, that the proof of the interest had satisfied the directors, for that the court would infer from the facts that the directors were so satisfied, they not having discretion to reject reasonable proof ; that the policy was not bad in law as offering an encouragement to suicide.

THE plaintiffs sued as executrix and executor of the Reverend Arthur Moore, deceased.

The 1st count stated that A. Moore, in his lifetime and in the lifetime of William Allen deceased, caused to be made a policy of insurance, dated 24th February, 1842, under the hands of W. Allen and defendants, three of the directors and members of a company of persons called the Victoria Life Assurance and Loan Company ; whereby, after reciting that he was desirous of effecting an assurance with the company in the sum of £999 upon his own life for the whole duration thereof, and had delivered to the directors a proposal in writing, (which was in part set out in the count, but upon which nothing turned,) and had paid the premium for a year, commencing February 4, 1842, it was witnessed, &c. : the count then set forth a policy for the payment of £999 to the executors, administrators, or assigns of A. Moore, within two calendar months after proof, to the satisfaction of the directors, of his death. " Provided also, that the assurance there-

by effected should be subject to the conditions of assurance printed on the back of the said policy: and the defendants and the company "became and were assurers to and with the said A. Moore for the said sum of £999, upon the terms, and subject to the conditions aforesaid." The count then set out the conditions printed on the back of the policy, of which only the following became material.

"8. Policies effected by persons on their own lives, who shall die by duelling, or by their own hands, or by the hands of justice, will become void, so far as regards the executors or administrators of the person so dying, but will remain in force only to the extent of any *bond fide* interest which may have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction."

"9. If a person who shall have been assured upon his own life for at least five years, or shall have paid a sum equivalent to at least five years' annual premiums, shall die by his own hands, the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay, for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy, if it had been surrendered on the day previous to his decease; provided the interest in such assurance shall be in the assured, or in a trustee for him, or for his wife or children, at the time of his decease."

The count then alleged that no statement in the proposal or declaration was untrue; that the assurance was not made through misrepresentation, &c.; that A. Moore, or his assigns, paid the premiums up to the time of his death; that the policy, up to the time of his death, was in full force; that A. Moore died on 9th December, 1852, and proof was given thereof to the satisfaction of the directors; that A. Moore in his lifetime, and the plaintiffs as executrix and executor, had in all things kept the conditions contained in the policy and printed on the back thereof; and although two calendar months after proof was given to the satisfaction of the directors of the said company of the death of the said Arthur Moore have long since elapsed, of all which premises defendants and the company had had notice, yet neither the de-

fendants nor the company had paid to the plaintiffs the £999, or any part thereof.

Count 2 ; for money received to the use of plaintiffs as executrix and executor, and on accounts stated between plaintiffs and defendants as executrix and executor.

Plea 1, to the first count. That the said A. Moore died by his own hands.

Replication 1, to the first plea. That before the death of A. Moore, John Moore and the said John Lucena Ross Kettle "acquired a *bonâ fide* interest in the said policy, by actual assignment by way of security for money, according to and within the true intent and meaning of the said conditions ; and proof of the extent of such interest was, before action, given to the directors of the said company to their satisfaction."

Replication 2, to the first plea. That before the death of the said A. Moore, the said John Lucena Ross Kettle "acquired a *bonâ fide* interest in the said policy, by virtue of an equitable lien, as a security for money ; and proof of the extent of such interest was, before action, given to the directors of the said company to their satisfaction."

Rejoinder. Issue taken by defendants on both the replications to the 1st plea.

Demurrer to the first replication to the 1st plea. Joinder in demurrer.

Plea 2, to the residue of the declaration. Never indebted. Replication to plea 2. Issue taken by plaintiffs.

The above issues in fact were tried before Pollock, C. B., at the summer assizes for Surrey, 1853 ; when a verdict was found for the plaintiffs, subject to a case which, so far as material to the present decision, was as follows : —

The above-named Arthur Moore was a clergyman, and the husband of the above-named plaintiff, Anna Maria Moore. Previously to their marriage, and for the purpose of making some settlement on Mrs. Moore and her family, Mr. Moore, not having the means of making a settlement in money, entered into a bond or deed of covenant, whereby he bound himself, at some future time, that is to say, either on the death of his father or of himself, (the plaintiff Kettle, who was examined as a witness, and who had become acquainted with Mr. and Mrs. Moore after their marriage, and in whose hands the bond or deed had been placed

as hereinafter mentioned, could not positively remember which, but thought in the latter event,) to secure to the plaintiff Anna Maria Moore £5,000. This bond or deed was accidentally destroyed by fire in Lincoln's Inn; and no copy of it can be found or procured.

The case then, in substance, stated that after the marriage Mr. Moore was in difficulties, and was unable to secure the £5,000 mentioned in the bond. After some negotiations between Mr. Moore, his father, Mrs. Moore, her father, and Mr. Kettle, an arrangement was made that Mr. Moore's father should keep up a policy for £2,400, effected on Mr. Moore's life, on condition that on Mr. Moore's death £1,700 out of the £2,400 should go to Mr. and Mrs. Moore's children, and that Mrs. Moore should out of her own private income keep up policies to be effected on Mr. Moore's life for £3,000, and that he should have no interest in them further than to carry out his bond or deed of covenant. The £5,000 was nearly made up by these two sums of £1,700 and £3,000. In pursuance of this arrangement, Mr. Moore effected two policies on his own life, one for £2,000 with the Universal Life Assurance Company, and another for £999 with the United Kingdom Assurance Company, and handed them over to Mr. Kettle as a trustee for Mrs. Moore; and at the same time the said bond or deed was placed in his hands, and was never given up. Afterwards the policy of £999 with the United Kingdom Assurance Company was given up, and the present policy substituted for it.

It further appeared that these facts had been communicated to the directors before action brought.

The court was "to have the same power to draw inferences of fact as a jury."

The case concluded as follows: —

The points raised, and intended to be argued for the defendants as to the issues in fact, are: that the evidence does not establish an assignment by way of security for money within the meaning of the conditions; that the evidence does not establish an equitable lien as a security for money within the meaning of the conditions; that, admitting all the facts proved to have come to the knowledge of the directors, the plaintiffs ought to have proved that the directors were satisfied therewith; in other words, that the proof to the satisfaction of the directors was a

condition precedent, and the directors under the circumstances were absolute judges of the sufficiency of the proof.

Upon the issue in law, the defendants will contend that the first replication is bad for not showing an assignment by deed.

The defendants will also, if necessary, contend, in arrest of judgment, that the action is not, under any circumstances, maintainable, the replication only setting up matter of discretion in the directors, or at most an equitable claim not enforceable at law by the executors of the assured, the present plaintiffs.

The questions for the opinion of the court are: whether, with reference to the above objections of the defendants, the issues of fact should be entered for the plaintiffs or the defendants, and whether judgment should be given upon the demurrer for the plaintiffs or defendants; and whether judgment should be given for the plaintiffs or defendants, or a nonsuit entered, or judgment arrested; and, if judgment be given for the plaintiffs, it is to be for £999 with interest, &c.

The case was argued on an earlier day in this term.

Bovill, for the plaintiffs. First, as to the demurrer to the first replication to the first plea. It was not necessary for the plaintiffs to allege or prove an assignment by deed. The allegation of the assignment may be supported by showing any acquisition of an equitable interest by Kettle. The eighth condition means that no assignment of the legal interest could be made. An assignment in equity, though not by deed, nor, strictly speaking, an assignment, must have been in view. This construction was put on a similar condition in a policy of assurance, by *Wigram, V. C.; Cook v. Black*, 1 Hare, 390. Perhaps the most natural way of reading the condition is to suppose that it contemplates, either an assignment by deed for a valuable consideration in money, or one by way of security or indemnity, or one by virtue of any legal or equitable lien as a security for money; thus applying the word "assignment" successively to each of the several modes of creating an interest. This appears more clearly by placing a comma after "assignment." Certainly, if only an assignment by deed, in the strict sense of the word, was contemplated, the replication is bad.

Next, as to the issue taken on the second replication, and as to the suggestion that judgment should be arrested. It is contended that there was no evidence that the interest was proved to the

satisfaction of the directors, as alleged in that replication; and that the first count is also bad for want of alleging that such interest was so proved. For this, reliance will be placed on the eighth condition. The ninth condition does, no doubt, give a discretion to the directors, as to the allowance to be made, in certain circumstances, to the family of the assured. But this does not control the eighth condition, which is in different language, and which alone applies to the present case. The words of the eighth condition, "upon proof of the extent of such interest being given to the directors to their satisfaction," do not give the directors an unlimited discretion as to the effect which they may give to the proof afforded, but only make it necessary for the claimant to give such proof as ought to satisfy reasonable men. Now here the facts show enough to satisfy reasonable men; for it appears that the testator was bound to secure £5,000 to his wife, and that, not being able to do this, he effected the insurance, and handed it over to a trustee for his wife. An actual assignment was not necessary for this purpose; the deposit with the trustee gave the latter an equitable interest sufficient to support the issue now in question. At any rate, the formal approval by the directors was not a condition precedent to the enforcement of the claim. *Dallman v. King*, 4 Bing. N. C. 105.

Bramwell, contra. As to the demurrer; the plea fails for want of an allegation that there was a deed; the words "actual assignment," in the eighth condition, cannot be disjoined from the words "by deed," as suggested.

As to the issue on the second replication to the first plea. The interest contemplated in the eighth condition must be an interest acquired subsequently to the execution of the policy. The language points to this construction. Moreover, if an interest prior to the execution, or contemporaneous with it, were contemplated, the condition, and the policy as explained by the condition, would be illegal; for then, in effect, it would be simply a policy insuring the life of a party though he should die by suicide; and that would be illegal, on the same principle as that upon which it was held, in the house of lords, that a policy insuring the life of a party though he should die by the hands of justice is illegal, as being contrary to public policy. *The Amicable Society v. Boland*, 4 Bligh, N. S. 194.¹ [Lord CAMPBELL, C. J. Why would

¹ *Ante*, vol. 2, p. 240.

the policy, so construed, be more objectionable than a policy by which a party insured the life of his debtor?] The provisions which the assurer would attach to such a policy would probably be very different from these. But, assuming that the eighth condition contemplates an interest acquired subsequently to the execution of the policy, no interest so acquired has been proved. There was no moment in which the interest was in the testator. [COLERIDGE, J. By whom would the policy be assigned?] Formally, no doubt, by the testator; but the only parties who, from the moment of the execution of the policy, could transfer a beneficial interest, would be his wife and the trustee. Again, there is here no legal or equitable "lien." A lien exists only where a party, entitled to the subject matter, gives intentionally or by the operation of law possession of it to another party, but retains the right of revesting the possession in himself by making some payment or doing some act. But here the testator never had the beneficial interest in the policy at all; nor could he acquire the possession by making any payment, unless by consent of the wife or her trustee. He never owed any debt to either. [WIGHTMAN, J. Would he not have been entitled to have it back, on paying the £5,000?] He would not, without the consent of parties holding it. Again, the plaintiffs, on this issue, were bound to show that proof of the interest had been given to the satisfaction of the directors. It is true that the directors were bound to judge on this point reasonably, not capriciously. [LORD CAMPBELL, C. J. Might not a jury, upon finding that there was in fact proof of the interest, infer that the directors, like themselves, had been satisfied with the proof? Might they not even draw this inference though the directors swore in the witness-box that they had not been satisfied in fact?] There is not enough evidence here to show that the directors ought to have been satisfied either as to the fact or the law. The conditions are framed to give the directors discretion as to whether they will allow the claim or not where the death has been by suicide.

Bovill, in reply. As to the last point: the distinction between the language of the eighth condition and that of the ninth shows that in the eighth no discretion, in the full sense of the word, is reserved to the directors. Where that is intended, the intention is clearly and very differently expressed, as in the ninth condition.

LORD CAMPBELL, C. J. We are all of opinion that the eighth condition is obligatory, and the ninth discretionary. On Tuesday we will let Mr. Bovill know whether we require him to reply further, and, if so, on what points. *Cur. adv. vult.*

LORD CAMPBELL, C. J., now delivered the judgment of the court.

Mr. Bovill need not have the trouble to reply, as, on consideration, we think that the plaintiffs are entitled to our judgment on all the points which arise in this case, except those which he abandoned in the course of the argument.

The verdict will be entered for the defendants on the plea that Arthur Moore died by his own hands.¹

And there will be judgment for the defendants on the demurrer to the first replication, which does not allege that the assignment relied upon was by deed, and which therefore is not, under the eighth condition of the policy, an answer to the plea.

The verdict upon the issue of fact taken upon this replication will likewise be entered for the defendants, as the evidence did not prove an interest such as is here alleged.

But we are of opinion that the second replication is good in law, and was established by the evidence.

The main objection to the sufficiency of this replication in point of law, is, that the eighth condition is not obligatory upon the insurance office; and that where the person who has effected an insurance on his own life dies by his own hand, this condition leaves it discretionary in the directors whether they shall or shall not make any payment on the policy in respect of the interests which are specified. The ninth condition, which contemplates a death by suicide, without any assignment of the policy, or equitable interest acquired in it by third persons, says, that "the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay" a limited sum for the benefit of the family. The eighth condition, however, in contrast with this, declares absolutely that, notwithstanding, the policy shall "remain in force" "to the extent of any *bonâ fide* interest which may have been acquired by any other person" in the manner specified. The construction of this condition appears to

¹ See note 1, p. 147.

us clearly to be, that, upon such proof as is required of this interest, the insurance office is legally liable upon the policy.

Next, it is argued that, if this be the true construction of the eighth condition, this condition is void, and indeed that the whole policy is vitiated, on the ground that it would offer an encouragement to suicide.

If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk: a stipulation that, in either case upon such an event, the policy should give a right of action would be void. But, where a man insures his own life, we can discover no illegality in a stipulation that, if the policy should afterwards be assigned *bonâ fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bonâ fide* for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal: and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide, is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee. On the demurrer to the second replication,¹ therefore, we think there ought to be judgment for the plaintiffs.

We are, next, to consider how the verdict is to be entered on the issue in fact taken upon it; and we are of opinion that the evidence proves all its allegations. The policy having been effected in the name of Arthur Moore, and by Arthur Moore, as alleged in the declaration, it was for valuable consideration (*viz.*,

¹ See note 1, p. 147.

the bond executed by him before marriage to make a settlement on his wife, which he had not done) handed over to Kettle, for the benefit of Mrs. Moore ; and although an assignment of it had not been regularly executed, as was intended, it remained with Kettle, as her trustee, down to the time of Moore's death. This, we think, was a "*bond fide* interest" in the policy "as a security for money," within the meaning of the condition and the replication.

But then, it is said, proof of this interest was not given to the satisfaction of the directors. It could hardly be argued that it was necessary to call the directors as witnesses, and to ask them whether they were satisfied with the proof, upon the understanding that if they said no, there must be a verdict in their favor. All that can be necessary is, that proof should be shown to have been laid before them, with which reasonable men would be satisfied ; and then the inference arises that the proof was to their satisfaction. By the special case the court is to have "the same power to draw inference of fact as a jury ;" and, from the evidence adduced, we do infer that the directors were satisfied of the facts alleged respecting the equitable interest on which the plaintiffs relied to prove the replication ; and that they only refused to pay on the notion that, in point of law, this was not a sufficient equitable interest, or, according to the argument of their counsel, the condition which they had introduced into the policy was illegal and void. To hold that they must acknowledge themselves satisfied, both as to the facts and the law upon which the claim is founded, would be to make the eighth condition quite discretionary, contrary to the clear meaning of the language on which it is framed.

We have now disposed of all the points of law and fact brought before us, and give judgment that the plaintiffs are entitled to recover.¹

"Ordered : that judgment be entered for the defendant on the demurrer herein, and verdict on all the issues for the defendant, except on second replication to first plea, which is to be entered for the plaintiff, with the agreed damages, on the first count of the declaration."

¹ It will be observed that the judgment supposes a different state of the record from that actually existing. The discrepancies were not material ; and the order was drawn up according to the true state of the record.

GARNER vs. MOORE.

(3 Drewry, 277. Coram Kindersley, V. C. 1855.)

Insurance by executor. Policy dropped by him. — An executor, without a special authority, applied the testator's assets for several years in insuring the life of a debtor to the estate. He then dropped the policy without consulting the parties beneficially interested, and without applying for the direction of the court in a suit for administration of the estate then pending: *Held*, that he was liable for the whole sum which would have been recovered if he had kept up the policy.

THIS case came on, on the hearing of a supplemental suit seeking to charge Dr. Moore, the executor of one Holditch, with the loss arising from the dropping of a policy on the life of Ferroll, a debtor of Holditch.

Holditch, the testator, died in 1845. Ferroll, being indebted to him in a considerable sum, secured part of it during Holditch's life by a promissory note and a policy of insurance in the Globe Office. None of the premiums appeared to have been paid by Ferroll, but the policy was kept up by Holditch. After Holditch's death, Ferroll continued wholly unable to pay the debt or any considerable part of it; but some time in 1847 remitted a small sum of £84 to the agent of Dr. Moore, then the surviving and sole acting executor of Holditch; and on the suggestion of Ferroll's agent, this sum was applied by Dr. Moore, together with £15 more out of the testator's assets, in effecting a further policy for £2,500, for seven years, on Ferroll's life, in the Medical and Clerical Life Assurance Office, of which Moore was a director. Dr. Moore having required Ferroll, without effect, to pay the second premium, paid it out of the testator's assets, and so continued to keep on foot the policy for three years.

In the mean time a suit (the original suit, to which the present one was supplemental) had been instituted by the parties beneficially interested in Holditch's estate for the administration of it, and to that suit Dr. Moore was a party. On the fourth premium on the policy becoming due, Dr. Moore did not consult the *cestui's que trustent*, nor did he make any application to the court, but left the premium unpaid and dropped the policy, and shortly afterwards Ferroll died, within the seven years. This bill was now filed to charge Dr. Moore with the loss of the money which would have been recoverable from the insurance office if the policy had been, as the plaintiff contended it ought to have been, kept up. Dr. Moore's defence was, partly, that the plaintiff knew

by himself or by his solicitor all through, that the policy was dropped, and concurred in it. This the plaintiff denied, and there was much evidence on the subject, the result of which was, in the opinion of the court, that the plaintiff was not a concurring party in the dropping of the policy. The defence was, also, that the premiums paid by the executor having been allowed in the suit, and the schedules to Dr. Moore's answer and other documents containing references to the policy and the premiums, the plaintiff must have known what the whole transaction was, or was at any rate so far put upon inquiry that he was now precluded from relief in the supplemental suit. The remaining material facts will be found stated in the judgment.

Dr. Moore, in his answer, and afterwards before the master, gave as his reason for dropping the policy, that, on investigation of the assets, it turned out that there were such heavy losses falling on the testator's estate, that it was much less than was anticipated, and would not be sufficient to pay all the legacies, and consequently could not in his judgment bear the expense of paying the premiums.

Mr. *Baily* & Mr. *Shebbeare*, for the plaintiff, contended that Dr. Moore, the executor, having elected to effect the policy, could not of his own authority drop it. He had made it part of the assets; a trust attached upon it; and even assuming it to have been a breach of trust in him originally to apply the assets to effect it, having once done so, he could not put an end to it without the assent of the *cestuis que trustent*, which assent he never had.

Mr. *Glasse* & Mr. *Briggs*, for the defendant. Of what has Dr. Moore been guilty in dropping the policy? Was it a *devastavit*? To be that, the policy must be treated as a part of the testator's property; but it was not. It was no part of Dr. Moore's duty to effect it. He might do so if he thought fit at his own risk; for if it had not turned out well, if the life had lasted long enough to make it a bad bargain, clearly the *cestuis que trustent* were not bound to take it. Then it was not part of the testator's property. If Dr. Moore was not bound to effect it, he could not be bound to keep it up. The original act was a breach of trust, and he could not be bound to continue to incur the liability to be charged with a breach of trust. [They cited *Garrett v. Noble*,¹ *Buxton v. Buxton*.²]

¹ 6 Sim. 504.

² 1 Myl. & Cr. 80.

Mr. *Baily* replied.

The VICE-CHANCELLOR. The facts of this case are the following: In the lifetime of James Holditch, whose surviving executor is Dr. Moore, Ferroll owed him a sum of about £4,000. To secure this he gave a promissory note, and in addition, in order partly to secure it in case of his death, James Holditch, no doubt with the consent of Ferroll, insured Ferroll's life for £2,500. No doubt, when a policy is effected on the life of a debtor by his creditor, the intention of both parties is that the debtor should pay the premiums. The premium payable on the *Globe* policy was about £142. This policy was effected in the lifetime of James Holditch, and the premiums, from the time of the policy being effected, or at any rate from the time of Holditch's death, were paid by Holditch or his executors; nothing whatever was paid by Ferroll. The executors of Holditch, after his death, continued to pay the premiums out of his assets, and I assume that, in doing so, they exercised a wise and sound discretion in keeping up that policy at the expense of the testator's estate.

The death of James Holditch took place in December, 1845; from October, 1846, Dr. Moore was the sole acting executor. In the early part of the year 1847, Ferroll employed a Mr. Pargetter as his agent to collect moneys for him and make certain payments, and Pargetter, in his character as such agent, received for Ferroll certain sums, amounting altogether to between £700 and £800, and by the direction of Ferroll he paid several sums, and then there remained in his hands, of Ferroll's money, £84. Then, by the direction of Ferroll, Pargetter offered to Mr. Morris, a gentleman acting as the agent of Dr. Moore, the £84, in part satisfaction of the £4,000 debt, suggesting whether it would not be expedient, instead of taking it as a payment, to effect with it a further policy on the life of Ferroll, and he suggested that the insurance should be effected in the Medical and Clerical Office, of which Dr. Moore was a director; and Pargetter says he suggested at the same time that it would be impossible to look to Ferroll for the payment of any of the premiums. Accordingly a policy was effected on the life of Ferroll, and the first premium, which was about £99, was paid by the £84, and the difference was paid by Dr. Moore out of the estate. The policy was a septennial policy. Morris carried, it seems, the £15, paid on it to the debit of Ferroll, and I assume, in favor of Dr. Moore, that

the intention was that Ferroll should pay the premiums, but of course with the knowledge that there was very little reason to expect that he could ever pay anything. He had never paid anything on the Globe policy, and it was extremely probable that the premiums would have to be provided for this policy, as they had been for the Globe policy. When the second premium was about to become due, which would have been on the 6th April, 1848, Morris applied to Ferroll, calling upon him to provide for the premium. It does not appear whether he had any answer at all; at any rate Ferroll did not pay, and on the proper day the premium was paid out of the testator's assets. The same thing occurred in 1849. In the mean time, in November, 1847, this bill had been filed by the plaintiff Garner to administer the testator's estate. The suit went on in the ordinary course. A decree — the common administration decree, I believe — was made in July, 1848. In October, 1849, Morris, who was then acting as agent of the executors, and, as it appears, under the authority of the court, died. The fourth premium on the policy would become due in April, 1850, and then Dr. Moore thought fit of his own sole authority to drop the policy. In June, 1849, a state of facts was carried into the master's office by Dr. Moore, claiming to be allowed the payment of premiums made by him; and a state of facts was also carried in by the plaintiff. [His honor then referred to the reasons given by Dr. Moore, referred to in p. 149.] It has been proved by the plaintiff that the information on which he founded his state of facts, with respect to the policy that had been effected, was obtained from the solicitor of Dr. Moore.

In that state of facts, which the master recited in his report, was a statement as to this debt, which was made in the report in the very words of the state of facts, and nobody challenged it. The report was made in July, 1851, and afterwards the cause came on, on further directions, and the master had allowed to Dr. Moore the payments he had made, and a decree was made in accordance with the report, to which no exception has been taken. Afterwards Ferroll died within the seven years during which the policy would have taken effect, so that if the policy had been kept up, £2,500 would have been realized for the benefit of the testator's estate.

On this state of circumstances, the question raised by the plaintiff is, — whether Dr. Moore is liable to make good the amount

which would have been recovered on the policy, if it had been kept alive; and if he is not liable to the whole amount, ought he to be disallowed the payments he has made? Now, it appears to me that the question resolves itself into three branches.

The first is, putting aside all consideration of the question whether the plaintiff concurred in what was done, and whether, by reason of what took place in the suit, the plaintiff is concluded, and supposing no such suit to have been instituted, and supposing this suit to have been instituted any reasonable time after the policy had dropped, whether, under those circumstances, Dr. Moore would be liable?

The second branch is, supposing Dr. Moore would have been liable, did the plaintiff by himself or by his solicitor concur in dropping the policy; because part of the defence of Dr. Moore is, that he dropped it with the concurrence of the solicitor of the other parties; the third branch of the question is this: is the plaintiff precluded by what took place in the former suit from now raising the question?

Now, firstly, as to the question of Dr. Moore's liability, if I may so call it, in the abstract. It is contended on the part of Dr. Moore, that he was under no obligation to effect this policy, and under no obligation, therefore, to pay either the first or any succeeding premiums; under no obligation to keep it up; he contends that it was entirely at his own option to effect it, and, when effected, to keep it alive or let it drop, and that in the exercise of his discretion he took the course that he did; he contends that this policy stood on quite a different footing from the Globe policy, and that by effecting this, although he did so out of the testator's estate, he did not constitute himself a trustee of the policy for the testator's estate. Now, with regard to the discretion of executors, when that discretion is given to them in express terms, then of course they may exercise it according to their judgment, and if it is alleged that they have exercised it wrongly, the *onus* of showing that it was an improper exercise of the authority is on the party alleging that fact. But an executor's discretion is not limited to the case where a specific discretion is vested in him by the will; he has a certain discretion incident to his office; but it is a very different discretion from a special discretion or authority. He is not to say, "I will do whatever in my discretion I think fit."

If he undertakes to apply in a specific mode not authorized, or if he takes upon himself to deal with any portion of property which has by any means become to any extent the property of the testator, or part of the testator's estate, I do not say the court will invariably hold that he had no right to do so, but the *onus* lies on him to show that things were in that state, that it was forced upon him to exercise a discretion one way or the other; and if there be a pending suit affecting the administration of the very estate of which he is executor, and if he does what he ought to do, viz., comes to this court and asks for its guidance and assistance, showing that he is in such a difficulty that he is obliged to exercise a discretion of some sort, the court would certainly not refuse him its assistance and direction.

In deciding upon the propriety of effecting this policy, Dr. Moore had no right to expect, judging from the circumstances attending the former policy, that Ferroll would ever be able to pay anything. He knew that no money could ever be got from Ferroll, either towards paying the debt or towards paying any premiums on the policy. Then Dr. Moore thinking himself justified in not expecting the debt, or any part of it, to be paid by Ferroll, and in that state of things considering it of importance to secure that part of it which was not secured by the Globe policy, accordingly effected this policy, in doing which I cannot say that he did not exercise a sound discretion.

It appears to me that it was not less an act of sound discretion in the executor to make it a seven years' policy; and I find Dr. Moore himself acted on the assumption that his course of proceeding was in pursuance of a sound discretion; he considered himself able to rely that the payments he had made would be allowed to him; and accordingly he carried in a discharge including these sums, and they were allowed to him. Then, assuming that it was a sound exercise of discretion to effect the policy, what was the consequence of effecting it? Why, when once it was duly and properly effected, and the premiums paid out of the testator's estate, Dr. Moore became a trustee of it for the estate. If he was not, whose policy was it? Certainly not Dr. Moore's. Was it then Ferroll's? Certainly not. Who would have been entitled to the money if Ferroll had died? Why, clearly the executor of Holditch, for the benefit of his estate. He was clearly a trustee of the policy, and I must take the policy as properly held in trust for the testator's estate.

Garner v. Moore.

The fourth premium was about to fall due in April, 1850. Now I accede to this as an abstract proposition, that, though it was a reasonable act of discretion to effect the policy, and to keep it on foot so far, it might have been an act of reasonable discretion then to drop it. But, when Dr. Moore says he dropped the policy in the exercise of his discretion, I must expect from him some justification of that exercise of discretion; some explanation to satisfy me that it was a sound exercise of his discretion. One thing at least is clear: Dr. Moore might have applied to the plaintiff and the others, or some other of the *cestuis que trustent*, or he might have applied in the suit; and I cannot concur in the suggestion that if he had, this court would not have entertained his application for assistance. If he had applied, the court would have given him its direction; but instead of doing that, he thinks fit, without any consultation with the persons beneficially interested, to drop the policy. What are his reasons for dropping it? [His honor referred to the reasons given by Dr. Moore in his answer, and stated that he did not consider them satisfactory.]

The question really resolves itself into this: when Dr. Moore had the opportunity of obtaining the sanction of the court, and did not avail himself of it, when he had the opportunity of consulting with the parties beneficially interested, and did not do so, but instead says: "I will drop the policy of my own sole authority," the question is, whether, under all the circumstances, his conduct was such that he can say he has properly refused to call in the intervention of the court, and has exercised a sound discretion? An analogy has been suggested as to a leasehold estate: suppose any debtor had offered as security a leasehold estate, subject to rent, and Dr. Moore had accepted it, and paid the rent to the landlord, he might have had afterwards to consider whether, as a matter of discretion, he should cease to pay the rent and give up the security, but it cannot be said that he would not be a trustee of that security for the estate. I am of opinion that it was not a sound exercise of discretion in Dr. Moore to let the policy drop. The very reason given by Dr. Moore, viz., that the assets were much smaller than they were supposed to be, is to my mind a reason for continuing the policy. The result is that Dr. Moore is liable for the amount which would have been realized if the policy had been kept on foot, unless he is exonerated by any acquiescence of the plaintiff, and that brings me to

the second question, did the plaintiff concur in the dropping of the policy?

[The court then proceeded critically to examine the evidence on this point, and concluded that there had been no concurrence.]

The third question is, whether, by reason of that which had taken place in the former suit, the plaintiff is precluded from relief in this suit.

On this question, his honor, after considering the entries in the schedule to the answer and other documents in evidence, concluded on this point that there was not sufficient to put the plaintiff on inquiry to the extent of precluding him from now seeking relief.

See *Gray v. Murray*, 3 Johns. Ch. 167; *S. C.*, ante, vol. 2, p. 91; *Soule v. Union Bank*, 45 Barb. 111.

MORLAND vs. ISAAC.

(20 Beav. 389. Coram Romilly, M. R. 1855.)

Insurance on debtor's life. — A tradesman insured the life of his debtor in his own name; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor, the court *held*, that his representatives were entitled to the produce of the policy after payment of the debt and premiums.

There is a distinction between a policy effected to secure a debt, and one to secure an annuity.

IN April and May, 1850, the defendant, an army contractor and outfitter, supplied goods on credit to Lieutenant Walker, who was then about to go abroad. On the 4th of June, the defendant delivered him a signed account, and on the 10th of June, the defendant, with Walker's knowledge, who attended at the insurance office for that purpose, effected a policy on the life of Walker for £500, in the defendant's own name. In the account delivered, one of the items debited was this: "1850, May 13, sum paid for insurance, £14 6s. 8d." Walker was debited therein with twelve months' interest, making together the sum of £169 19s. 8d., and he was credited with a draft for £169 19s. 8d., payable twelve months after date.

Soon after, Walker went to Canada. Two letters were written to him there by the defendant. The first, dated 25th April, 1851, was as follows: — "Sir: We regret to be under the neces-

sity of again addressing you upon the subject of our account, but we cannot allow it to remain without coming to some kind of arrangement in the matter ; unless, therefore, some satisfactory settlement is made immediately, more especially with regard to your over due acceptance, we shall have no other resource but to lay the whole case before the Master General of the Ordnance, and leave the matter to his adjudication." The second letter, dated 10th November, 1851, was as follows :—"Dear Sir : Many months having passed since you embarked, and as we have made repeated applications without receiving from you an answer, we apply again and ask you to pay your dishonored draft, as also the sum paid for your insurance. It is our intention, should you fail to reply to this, to place the matter in other hands. With reference to your account this is considerably overdue," &c.

Walker died in Canada, in March, 1852, without having discharged the debt. The defendant Isaac received the £500 of the policy, and claimed the whole, on the ground that it had been effected by himself and for his own benefit. The defendant denied that any express agreement had ever been made between him and Walker, either as to the amount to be insured (which was to be entirely at the defendant's discretion) or the ownership of the policy, on payment of the premiums ; but it was clearly understood by the defendant, and, he believed, also by Walker, that the policy was the defendant's, and with respect to the payment of the premiums, that it should, in the first instance, be made by the defendant ; and it was fully understood that the moneys assured by the policy should remain the defendant's own absolute property. The defendant's understanding and intention was, as he alleged, that if Walker should, in his lifetime, pay off the debt and premiums and expenses of insurance, he should be at liberty to do so, and in that case, the defendant would either have dropped the insurance or transferred the policy to Walker. He also stated, that the entry in the account of the item of £14 6s. 8d. for insurance, was a mistake.

Mr. *Bright*, in the absence of Mr. *R. Palmer* for the plaintiff, argued, that the claim advanced by the defendant to be entitled to the produce of the policy for his own benefit was quite inconsistent with the facts and the accounts and letters of the defendant himself, in which he had treated Walker as liable to pay the amount of the premiums. That if such were the

Morland v. Isaac.

case, the policy was a mere security for the debt, and that the plaintiff was entitled to the balance of the produce of the policy after discharging the debt. Secondly, he argued, that the documents evidenced a constructive trust. *Forster v. Hale*.¹ He also referred to *Lea v. Hinton*,² which he stated had been affirmed.

Mr. Roupell & Mr. Haddan, for the defendant. *Primâ facie* a policy effected by A in his own name, on B's life belongs to A, and the mere proof that some of the premiums were paid by B does not rebut the presumption. *Triston v. Hardey*.³ To establish an ownership in Walker, a contract must be proved that he would pay, and an obligation on him to keep up the insurance. No such contract is proved, and its existence is positively denied by the defendant. It is true, that the premium was charged in the account, but it was never paid, and nothing was done by Walker to recognize the payment in his behalf, or to render himself bound to keep up the policy. The first charge is sworn to have been made by mistake, and the other was never assented to. The policy was not effected in pursuance of any contract, and unless the plaintiff establishes some subsequent contract which proves the ownership to have been in Walker, he has no right to any part of the produce of the policy on paying off the debt. *Gottlieb v. Cranch*.⁴ The attendance of Walker at the insurance office proves nothing; it was a mere compliance with one of the requirements necessary to effect any policy. The defendant might have dropped or continued the policy at his pleasure, and the legal ownership of the policy remains in the defendant unaffected by any trust. They cited *Burridge v. Row*,⁵ *Godsall v. Boldero*.⁶

THE MASTER OF THE ROLLS. I think the plaintiff is entitled to a decree. It has been justly observed, during the argument, that this matter depends on the contract between the parties. This, however, may either be expressed in writing or by parol, or it may be inferred from the acts and dealings between the parties, from which a contract between them may appear.

¹ 3 Ves. Jr. 696; 5 Ves. 308.

² 19 Beav. 324; *ante*, p. 92.

³ 14 Beav. 232; *ante*, p. 83.

⁴ 4 De G., M. & G. 440; *ante*, p. 86.

⁵ 1 Younge & C. (C. C.) 183; *ante*, p. 2.

⁶ 9 East, 72, overruled by *Dalby v. The India and London Life Assurance Company*, *ante*, vol. 2, p. 371, and *Law v. The London Indisputable Life Policy Company*, *ante*, vol. 2, p. 404.

There is a distinction between an assurance to secure a debt, and one to secure the payment of an annuity. In the case of an annuity, the grantee is at liberty to effect an insurance or not; it is a distinct contract which diminishes his profits to the extent of the premiums, the amount of which the grantee cannot recover from the grantor. Thus, if the grantee of an annuity of £100 a year pays £5 a year for insurance, he cannot charge it against the grantor, but it must come out of his own pocket. The object of an insurance, in the case of an annuity, is to indemnify the grantee against the premature death of the grantor, and in such case it requires strong facts to bring one to the conclusion that it was incumbent on the grantee to keep it on foot, and to assign the policy to the grantor upon his redeeming the annuity.

The case is different where a creditor insures the life of his debtor. If the creditor pays the *premiums* out of his own pocket, the case is analogous to that of the annuitant; but if he makes the debtor pay them, the case is perfectly different.

The plaintiff stands in the same situation in which Walker would stand if he were now alive and came forward and said, "I am willing to pay you the amount of the bill and all premiums on the policy, and I require you to assign it to me." The case of the defendant is, that the understanding was that he should be at liberty to do so, and in that case the defendant would either have dropped the insurance or transferred the policy to Walker. Now, that is exactly what the plaintiff is asking in this case. He says, "I will pay the total amount of the bill and of the premiums, and I ask you to transfer the produce of the policy to me." Neither Walker, nor the plaintiff, would be entitled to this, unless there had been that which amounted to an understanding and agreement between the defendant and Walker, that Walker should pay the premiums, for if not, the creditor would have taken on himself the risk, and might say to the debtor, "You have nothing to do with the policy."

What are the facts of this case? The defendant tells Walker he will insure his life, and he gets him to attend at the insurance office. Walker, therefore, had knowledge that the policy was effected. An account is delivered at the time, in which Walker is charged with "the sum paid for insurance." In November, 1851, a letter is written by the defendant to Walker, requiring payment "of your dishonored draft, as also the sum paid for your

insurance." This evidently refers to the second premiums on the policy, for the letter proceeds, "with reference to your account, this is considerably overdue." It therefore refers to the account previously sent, which contains the item for the first premium. I hold it clear, therefore, that this letter refers to the second premium.

If Walker had been sued, could he have successfully resisted paying the premiums? The answer would be, "You knew the policy was to be effected; you attended the office; the account was delivered to you, in which the payment was charged; you made no complaint, and did not say you were not liable; a second account was sent, and again you made no complaint." How, after all this, could he say he was not liable? If, then, he was bound to pay the premiums, is he not entitled to have the produce of those payments? According to the defendant's contention, if this matter had gone on for twenty years, and the defendant had charged Walker with all the payments, he might now refuse to assign over the policy. The defendant would, I think, have had a right to deduct the amount of his bill, and the amount paid for the insurance, but the blame would belong to Walker.

The plaintiff stands exactly in the same situation as Walker. This policy was a security for the debt and the premiums, and I am therefore of opinion that, on payment of all that is due to the defendant, the plaintiff is entitled to the balance.

The defendant must pay the costs of suit.

As to analogous cases of annuity, see *Gottlieb v. Cranch*, ante, p. 86, and note.

GREY vs. ELLISON.

(1 Giff. 438. Coram Stuart, V. C. 1856.)

Annuity. Insurance by grantee to secure. — An insurance company purchased an annuity and took as a security an assignment of the whole equitable interest of the grantor in a trust fund, which produced much more than enough to pay the annuity; with a proviso that in case the company should insure any sum not exceeding the price of the annuity, and should pay an additional rate of insurance, by reason of the grantor going beyond sea, all sums so paid for additional premiums should be retained out of the life interest, and the surplus be held in trust for the grantee. No policy of assurance was, in fact, effected, except that the company became their own insurers by making a policy in a separate branch of their own company. *Held*, that though the grantor did, in fact, go beyond sea for several years, the company were not entitled to charge the premiums for the extra risk which had been incurred, no additional premiums having been in fact paid.

Grey v. Ellison.

THIS bill was filed by the six infant children of Sir Charles Edward and Lady Elizabeth Grey, deceased, in order to obtain payment of the dividends, &c., of certain funds settled on the marriage of their parents.

By a post-nuptial settlement, dated the 18th of May, 1821, in pursuance of an order of the court of chancery, Sir C. E. Grey assigned to trustees (of whom Ellison was the survivor) the share of Lady E. Grey, under the will of her uncle, T. C. Jervoise, on trust to invest the same in stock, on trust to pay the dividends of two shares to Lady E. Grey for her separate use, and one third to Sir C. E. Grey and his assigns, and on trust for the survivor; remainder among the children of the marriage, &c., &c.

By an indenture, dated the 14th of November, 1837, in consideration of £6,832 16s., advanced by the trustees of the Globe Insurance Company to Sir C. E. Grey, he, Sir C. E. Grey, covenanted to pay them £800 during his life, and further assigned the dividends on his one third share in £85,054 5s. 6d., and £5,775 12s. 1d., or other money to arise from such share of Lady E. Grey in the estate of her late uncle, and subject thereto for the benefit of Sir C. E. Grey. Sir C. E. Grey also covenanted that in case the trustees of the company, their executors, &c., &c., should at any time thereafter insure any sums not exceeding £6,832 16s. on the life of Sir C. E. Grey going beyond the seas, or taking any military or naval appointment, he, the said Sir C. E. Grey, would pay the trustees all such sum or sums as should be advanced by them or their *cestuis que trusts* for an additional premium or premiums, in respect of his going beyond the seas, or taking a naval or military appointment; and that all sums so advanced by the trustees should be a charge on the premises thereby assigned. By an indenture dated the 25th of October, 1839, indorsed on the above indenture, Sir C. E. Grey granted an additional annuity of £116, charged on the same property in reservation of £958, paid by the trustees. The indenture also contained a similar covenant as to the payment of premiums.

By an indenture dated the 13th of November, 1839, in consideration of £2,000 paid to Sir C. E. Grey, he, Sir C. E. Grey, assigned to J. A. Smith and N. Malcolm the said one third share on trust to pay first the costs, &c., &c., then the two annuities of £800 and £2,116 and any additional premiums, and to retain the surplus for their own use. Sir C. E. Grey, for the consideration

Grey v. Ellison.

aforesaid, assigned his life interest in remainder in the other two thirds, on certain trusts for the benefit of his children. The dividends in the one third share were applied under the deed until the death of Lady E. Grey, which took place on the 15th of November, 1830, leaving Sir C. E. Grey and several children her surviving.

In June, 1842, Sir C. E. Grey went to the West Indies as governor of Barbadoes, when £467 10s. was paid on his behalf to the Globe Insurance Company, on the ground that the company had paid, or would have to pay, that sum for additional premium.

The Globe had not effected any insurance with any insurance company on the life of Sir C. E. Grey, but in 1837 the trustees of the Globe Insurance Company opened a policy in the life department of their own office, whereby, in consideration of £329 8s. 4d., the sum of £6,833 was assured. There was also a second policy opened by the same trustees in the same office for £958, by a policy dated the 28th of November, 1839.

Neither of the policies was stamped, but checks were drawn for the sums of £329 8s. 4d., and £54 12s. 6d., signed by three of the directors, which were paid by the bankers on account of the annuity department to the credit of the life department, and receipts were given by the cashier in the life department. When Sir C. E. Grey left Europe, the additional premiums, of which only that for the first year was paid by Sir C. E. Grey, amounted annually to £467 10s.

In 1855, Sir C. E. Grey returned to England.

The trustees of the Globe Insurance Company claimed to be allowed all the subsequent annual payments of £467 10s., which they alleged they had paid for premiums from the 1st of March, 1843, to 1855, when Sir C. E. Grey returned; and claimed to be entitled to charge such payments on that part of the one third which exceeded the sums originally assigned, the trust funds having increased from £85,054 5s. 6d., and £5,575 12s. 1d., £110,000 consols.

Mr. Bacon & Mr. W. W. Mackeson, for the plaintiffs, contended that as no actual insurance had been effected, the insurance company having elected to run the risk, they could not be allowed the additional premiums. They cited *Hutchinson v. Wilson*.¹

¹ 4 Bro. C. C. 488.

Grey v. Ellison.

Mr. *Amphlett* appeared for the defendant Ellison.

Mr. *Malins* & Mr. *Baggallary*, Mr. *Elmsley* & Mr. *Martineau*, and Mr. *Oliver*, appeared for parties in the same interest with the plaintiff.

Sir *F. Goldsmid* appeared for the Globe Insurance Company.

The VICE-CHANCELLOR. This case raises the question, whether a mode of transacting business which has been very usual with this insurance company, and probably with others, is effectual for the purpose intended.

By the deed which granted an annuity to the Globe Insurance Company, Sir C. Grey assigned to them his equitable life interest — he says, in one third; but the insurance company says, in whatever more than one third he might be entitled to — in a very large sum of money. The effect of the deed is, that the Globe Insurance Company have vested in them the whole equitable life interest, subject to their right to deduct their annuity and any other payment which, according to the terms of the deed, can be properly deducted. It is important to observe that of the surplus which may remain after their payments, they are, by the express terms of the deed, trustees for Sir C. Grey, or whoever may claim under him. Therefore there being an assignment of the whole equitable interest to the insurance company, and they holding it in trust to account for the surplus after satisfying their demand; the question arises, how much and what sort of payments they are entitled to deduct? As to their right to deduct the annuity granted, there is no question. But it is said by them that, inasmuch as the annuity would determine on the death of Sir C. Grey, and that by his going abroad, and into climates where his health and life might be endangered, their risk would be greatly increased, they have made provision by this instrument for charging against him that which would be sufficient to indemnify them against that risk.

The terms of the covenant are very plain. There is, first, a stipulation that if Sir Charles Grey should go abroad, he should give notice to the Globe Insurance Office; next, there is the stipulation in question, which is in these terms: "That in case this company shall at any time hereafter insure any sum, not exceeding the £6,800 stated, on the life of Sir C. E. Grey, and shall pay any additional rate of insurance by reason of his going beyond seas; that then all such sum or sums as shall be advanced

by them for an additional premium, may be retained by them out of the property assigned to them in trust." They had a right to frame the covenant for their own indemnity in their own way. But on the language used it can hardly be contended that if no insurance at all were effected — if there was not in existence that which they call a policy of insurance — there could be any additional premium. It is remarkable that the only mention of any policy of insurance is in this clause; there seems to be no mention of any insurance to be effected to protect them against the ordinary risk; and yet, if there were no insurance to protect them against the ordinary risk, there could clearly be no additional premium; for an additional premium must be something to be added to a premium previously paid. There is no contract at all for an ordinary policy of insurance upon the ordinary risk. Therefore it is difficult to understand, when the contract is thus expressed, if no premium has been paid at all, and not only no premium, but no additional premium, and no payment of any kind has in fact been made, and no instruments were in existence in respect of which it could be made, how this company can be entitled to deduct anything.

But the insurance company say that virtually there was a policy of insurance effected — that all that is ordinarily done with reference to effecting a policy of insurance was done. Medical men were referred to; and an instrument was prepared and executed; and altogether such a policy of insurance as, if Sir C. Grey had gone abroad, would have required, in order to keep it in force, the payment of an additional premium. But when the instrument is looked at, it is impossible to see upon what view it can be considered as a policy of insurance at all. An objection was taken that the instrument was not stamped. This question must depend on another question, whether it is an instrument requiring a stamp. What is produced is an instrument by which some members of this company agreed with other members of the company that, in a certain event, the company shall pay to the company a certain sum of money. It is only necessary to state the terms of such a contract to show that it is merely an empty formality — an instrument that means nothing. Nobody could sue upon it; no remedy could be obtained in respect of an instrument of this sort by any one member of this company against any other member.

Grey v. Ellison.

It has been said, however, and I believe said with perfect truth, that this is an ordinary mode of transacting business, not only with the Globe Insurance Company, but with other insurance companies. But this court can only look at what is laid before it to see whether it be a contract, and whether it be that which deserves to be dealt with, or which the court can, upon its principles, deal with as a contract at all. The ground for calling it a contract is this, that this company, with large transactions and large capital, and carrying on an extensive business, has two departments — one the assurance department, and the other a department which deals in annuities and buys annuities. But although there are two departments of one and the same company, the identity of the company is the same. It is said that it is only this — that the company are their own insurers. That is an inaccurate expression, very often used, but it is an expression that means this, that there is no insurance at all; that is to say, that the person who might have insured chooses, instead of insuring, to undergo the risk himself. That is exactly what this company did; for if there had actually been an insurance, it would mean that, if the event specified in the contract of insurance happens, a gross sum shall be paid. In this case not only could no gross sum ever be paid, but it was never the intention or meaning of the transaction that any sum should be paid in respect of this instrument by any one person to any other.

Therefore, to treat this as a policy of insurance, in the sense of its being a contract to bind these parties, seems to me not to be maintainable on any solid ground of argument. The objection on the ground of the stamp duty seems to me an idle objection. It cannot be said that a thing that is merely useless and inoperative requires a stamp. If a man were so fanciful as to grant a lease to himself of his own house, with a covenant that he should quietly enjoy, and a covenant that he should pay to himself a rent for his own house, and chooses to conduct it in the way of having two departments, — that is, that he will draw checks upon himself upon his own account for rent, and pay them into another account of his own at his banker's, — it would be a mere whimsical transaction; but it would be futile and an abuse of language, to say that it came within the law of contract, or within any fiscal regulation respecting stamps.

It seems, therefore, that — so far as this case depends on the

right of the company to deduct from that fund of which, after satisfying their own legitimate demand upon it, they are trustees — [it is] impossible to say that they are entitled to deduct anything as in respect of any additional premium paid by them ; for such right is entirely discountenanced by the language of the deed, which must regulate their conduct as trustees of this fund.

Another view of the case, however, is of some importance. As to the substance of what was intended, there seems to be no doubt. What was intended by this covenant was, that the Globe Insurance Company should be protected against the event of Sir Charles Gray going abroad to a climate which should put his life in peril. Now they had a very easy means of enabling themselves to obtain that protection ; and the covenant might have been framed so as to entitle them to retain and be paid a certain annual sum in case Sir Charles Grey should go abroad. But there is nothing in the terms of the contract to justify that construction of it. If they chose to incur the risk themselves, without effecting any policy of insurance, they have not stipulated for any right to indemnify themselves by retaining any sum at all. The language of the deed makes it impossible to say, that — not taking that security which they had stipulated to themselves a right to take, not getting any such deed or instrument as they had reserved to themselves a right to — they are yet to be dealt with now as if they had bought it and paid the money for it. That contract Sir Charles Grey never entered into. If they meant him to enter into it, they should have told him so ; and it is in vain to say, that the result is exactly the same to him — that he is no more a loser than if the transaction had been conducted exactly in the way that was stipulated for. They have a right to exact the performance of the contract according to the plain construction of its language ; so has he ; and neither has a right to anything else.

The case before Lord Thurlow (*Hutchinson v. Wilson*) illustrates the principle upon which the court is bound to deal with this contract. A merchant instructed to effect a policy of insurance, instead of doing so, chose to take on himself the risk, and, having taken the risk, sought, as the Globe Insurance Company seek now, to take to himself the money which he would have paid if he had obeyed his instructions. But inasmuch as he never effected the policy of insurance, preferring to take the risk

Gilly v. Burley.

upon himself, Lord Thurlow said in plain terms that he should not be allowed the premium. In this case the insurance company took a security to indemnify themselves for the expense of effecting and obtaining an instrument to secure themselves, which they never obtained. They are, therefore, not entitled to charge this trust fund on the principle that they did make it. The Globe Insurance Company are trustees of the whole of this fund, and in accounting for that surplus of which they are trustees for the plaintiff or others claiming under him, I cannot, as at present advised, think them entitled to deduct anything in respect of payments which they never made in respect of a policy which never was effected.

GILLY vs. BURLEY.

(22 Beav. 619. Coram Romilly, M. R. 1856.)

Marriage settlement. Bonuses. — Upon the construction of a settlement, it was *held*, that a policy effected in the names of trustees was itself settled; but that, under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. Bonuses having been declared, the husband continued to pay the full premiums, and it was *held*, on his death, that the bonuses were accretions to the trust, and did not belong to his executors.

MR. AND MRS. GILLY intermarried in 1825. By the settlement made previous to their marriage, after reciting that it had been agreed that Mr. Gilly “should effect an insurance on his life in the Rock Insurance Office, in the city of London, for the sum of £2,500, in the names of” the two trustees, and that the said Mr. Gilly “should enter into the covenant thereafter contained for payment of the annual premiums for keeping the said insurance on foot, and that such trusts as were thereafter mentioned should be declared of the sum of £2,500 so to be insured;” and reciting that the insurance had that day been effected in the names of the two trustees, it was witnessed, that “for declaring the trusts of the sum of £2,500 to become due and payable to the” said trustees, upon the decease of Mr. Gilly, under and by virtue of the said insurance, it was thereby agreed, that the trustees should stand and be possessed of the said sum of £2,500, and every part thereof, upon trust for Mrs. Gilly for life, with remainder to Mr. Gilly for life, with remainder to their children. And Mr. Gilly covenanted to pay, from time to time,

Gilly v. Burley.

the annual premiums, "which should from time to time become due and payable for keeping the said insurance on foot."

Prior to the marriage, Mr. Gilly had made a proposal to the office which had been accepted, but no policy had been executed until 1826, when it was made out in his own name, and not in that of the two trustees.

A new trustee was appointed in 1838, and by the deed, to which Mr. Gilly was a party, it was recited that the trust funds consisted of certain consols and the "policy of insurance," and it was declared that the trustees should stand possessed of the consols, "and the said policy of insurance for £2,500 so intended to be transferred," upon the trusts of the settlement.

Mr. Gilly died in 1855, at which time, by bonuses, the policy had increased by £1,222, and the question was, whether this addition was subject to the trusts of the settlement.

By the rules of the Rock Company, persons holding policies were entitled to elect in which of the three ways every bonus should be paid or applied, which were as follows: 1st. By the payment, at the time, of the bonus to the holder of the policy; or 2d, by a deduction from the amount of the future annual premiums; or 3d, by the addition of the amount to the insurance.

No option appeared to have been exercised.

Mr. *Selwyn* & Mr. *Surrage*, for the plaintiffs, the executors of Mr. Gilly, contended that the £1,222 formed part of the estate of Mr. Gilly, for he had contracted only for a settlement of £2,500, for which the policy was a security, and no trusts were declared of anything beyond that amount. That, as he had the option of requiring the bonuses to be applied in diminution of the premiums, and as it was his interest so to do, it must be assumed that the accretions belonged to him, and that the sum of £1,222, which had been produced by the payment of an excess of annual premiums, belonged to the person whose estate had paid for it.

Mr. *G. L. Russell*, for the defendants. By the contract, the policy was to be effected in the names of the trustees, and Mr. Gilly was under an obligation to pay the premiums to keep it up. The whole benefit of the policy would, therefore, have vested in the trustees, if the policy had been effected in their names; they were, consequently, entitled to the policy and to the whole fruits of it. The fact of the policy having been effected in the name

of Mr. Gilly cannot alter the right of the parties, and neither he nor his executors can take advantage of his own default. By the form of the deed, the insurance was to be effected, kept up, and settled, and there is no declaration of trust of any surplus in favor of Mr. Gilly. He cited *Parkes v. Bott*.¹

The MASTER OF THE ROLLS reserved judgment.

The MASTER OF THE ROLLS. The short question in this case depends on what is the construction of the settlement, and whether the executors of the husband, or the trustees of the settlement, are entitled to the bonuses declared on a policy effected on his marriage.

The settlement recites, that it had been agreed that the husband should effect an insurance on his life for £2,500 in the names of the trustees, (I think that is a very material circumstance,) and that he should enter into a covenant for payment of the annual premiums for keeping the said insurance on foot, and that such trusts as thereafter mentioned should be declared. It recites that the insurance had been effected in the names of the trustees, (which was incorrect,) and it goes on in these words:—“And for declaring,” &c. [See *ante*, p. 167.]

Upon this it was argued, for the executors of the husband, that, in effect, this was nothing more than a settlement of a sum of £2,500, which was to be secured by a policy, and that this was proved by nothing being said except as to the £2,500 secured by the policy; and that in no part of the settlement are the words “the policy,” or “the money secured by the policy,” or anything tantamount to it, to be found. It is also pointed out, that the covenant is not to pay the whole premiums, but to pay the premiums “from time to time due and payable for keeping the said insurance on foot.”

On the other hand, it was argued, for the trustees of the settlement, that this was a deed to settle the policy for £2,500 and all that it might produce; that it was not merely a covenant to secure that amount, but that the policy is to be vested in the trustees, and, that the whole being in the hands of the trustees, the accretions will follow the trust.

On considering the settlement and the arguments of counsel, I think this was a deed to settle the policy and not the sum of money. I concur that it was only a policy of £2,500, which the

¹ 9 Simons, 388.

husband was bound to keep on foot, and that if he had thought fit, he might have caused the bonuses to go in reduction of the premiums, and have paid the reduced annual premiums necessary to keep the policy for £2,500 on foot ; he would have been justified in doing so. It was important that the policy was to be effected in the names of the trustees, but nothing turns on the fact of its having been originally in the name of the husband. I think the case should be treated exactly as if the husband had performed his covenant, and the policy had been effected in the names of the trustees ; its being effected in his name was irregular in form, but in substance it is to be treated as if it had been effected in the name of trustees. The trustees being owners of the policy, which would carry all the bonuses with it, they became owners of the bonuses. The husband had the option of saying, " In future I will pay diminished premiums, so as to keep up an insurance of £2,500 and no more," but he has not thought fit to do so ; what he has done, has been to add to the fund of the settlement.

I am of opinion that the bonuses belong to and form part of the moneys secured by the policy, and that the settlement affects the whole of them equally. I attach no importance to the fact that the executors have what may be called the legal estate in the policy. They get it only by reason of the husband not having performed his covenants in form, although he did in substance, by effecting the policy in the name of the trustees. If it had been so effected, the executors would now be claiming the bonuses against the trustees. At law, the executors would have had no title, and in equity, I think, they have none, although the husband might have obtained the benefit of these bonuses in the way I have stated ; but he has not thought fit, or apparently desired to do so. This is confirmed by what took place in 1838, when he appointed new trustees, and transferred the policy to them by deed, and declared that they should stand and be possessed of the policy itself upon the trusts of the settlement, and, in fact, transferred the money secured by the policy, which, I assume, included a part of the bonuses which had been declared on the policy at the time.

If the option was not exercised by the husband, it follows that the bonuses went with the rest of the moneys secured by the policy, and were subject to the same trusts. He never exercised

 Reis v. The Scottish Equitable Life Assurance Society.

this option ; but he has done more, he has executed a deed which seems to express that he intended not to exercise it. I am of opinion that the bonuses follow the capital, and belong to the trustees, and are subject to the trusts of the settlement.

Note. — On questions of the right to bonuses and accretions, the following authorities may be referred to: *Brander v. Brander*, 4 Ves. 800 ; *Paris v. Paris*, 10 Ves. 185 ; *Witts v. Steere*, 13 Ves. 363 ; *Barclay v. Wainwright*, 14 Ves. 66 ; *Norris v. Harrison*, 2 Mad. 268 ; *Courtney v. Ferrers*, 1 Sim. 137 ; *Ward v. Combe*, 7 Sim. 634 ; *Parkes v. Bott*, 9 Sim. 388 ; *Vaughan v. Wood*, 1 Myl. & K. 403 ; *Simpson v. Mountain*, 4 Law J. N. S. (Ch.) 221 ; *Price v. Anderson*, 15 Sim. 473 ; *Johnson v. Johnson*, 15 Jurist, 714 ; *Plunkett v. Mansfield*, 2 Jones & Lat. 344 ; *Domville v. Lamb*, V. C. Wood, 9 March, 1853 ; *Cumming v. Boswell*, 2 Jur. N. S. 1005. REP.

 REIS vs. THE SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY.

(2 Hurl. & N. 19. Exchequer, 1857.)

Restrictions as to travel. Parol evidence. — To a declaration on a policy of insurance on the life of H., conditioned that if H. went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that H. should be at liberty to visit Tangiers, or any other port within the Mediterranean; the defendants pleaded that H. departed beyond the limits of Europe otherwise than by visiting Tangiers or any other port within the Mediterranean. The court refused to allow the plaintiffs to plead as a replication on equitable grounds, that at the time of the making of the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports and places out of Europe; and that the plaintiffs entered into the policy on the terms of such stipulation.

Raymond had obtained a rule nisi to reply several matters. The declaration was on a policy of assurance for £2,000 upon the life of Thomas Haire, subject to a condition that in case T. Haire should depart beyond the limits of Europe, all claim to any benefit out of or interest in the funds of the society should cease and determine, excepting always in so far as relief was provided, or might lawfully be granted by the directors of the said society, agreeably to the laws and regulations thereof ; but that notwithstanding the above restriction Haire should be at liberty, without leave or extra premium, to visit Tangiers, or any other port within the Mediterranean, but that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia and Africa." Plea : That after the making of the policy T. Haire departed be-

yond the limits of Europe otherwise than by visiting Tangiers, or any other port within the Mediterranean. To this plea the plaintiffs proposed to reply: First, joinder of issue; secondly, as a replication on equitable grounds, facts showing that at the time of the making of the policy it was expressly stipulated by and between the plaintiffs and defendants, that the policy should not be vitiated by reason that the said Thomas Haire carried on business at Gibraltar, or that he visited ports and places out of Europe, and that the plaintiffs entered into the policy on the terms of such stipulation; thirdly, leave and license by the defendants to Haire to depart beyond the limits of Europe.

Rew now showed cause. If the facts set out in the second replication are true, the plaintiff should have applied to a court of equity to reform the contract: they show that he never had a legal right. Therefore the matter cannot be replied by way of equitable answer to the plea. *Gulliver v. Gulliver*, 1 H. & N. 174.

Raymond, in support of the rule. *Wood v. Dwarries*, 11 Exch. 493, is an authority that the replication ought to be allowed. It was part of the real bargain that Haire should be at liberty to go to ports and places out of Europe. The defendant therefore pleads as a defence matter which, in equity, he would be precluded from setting up by a term of the contract not stated in the written instrument, and this court may give equitable relief without the instrument being first reformed. That was the test applied by the court in the case of *Luce v. Izod*, 1 H. & N. 245. [BRAMWELL, B. That was an application by the defendant for leave to plead an equitable plea. The parties had put into writing something which, in consequence of a mistake, did not embody the real terms of the agreement between them; the plaintiff claimed in a court of law a legal debt, and the defendant sought to avoid being driven into a court of equity to defend himself. Here the plaintiff, having the power of choosing his tribunal, resorts to a court of law of his own accord.] *Vorley v. Barrett*, 1 C. B. N. S. 225, shows that the agreement having been fully performed, it is not necessary for the plaintiff to go to a court of equity for the purpose of reforming the agreement.

POLLOCK, C. B. I am of opinion that this rule, so far as it relates to the second replication, must be discharged. There is a plain distinction between *Wood v. Dwarries* and the present case. In *Hunter v. Gibbons*, 1 H. & N. 459, which more nearly resem-

Fowler v. The Scottish Equitable Life Insurance Society.

bles this case, the court decided that an equitable replication could not be allowed, where, if the whole matter had appeared in the declaration, the declaration would have been demurrable. The court will not allow a plaintiff to put himself, by an equitable replication, in a better position than he would have been in if the whole matter had been set out in the declaration. In *Wood v. Dwarries* the prospectus was part of the contract, and if the whole matter had been before the court in the declaration, it must have shown that the plaintiff had a legal right.

MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Rule discharged as to the second replication; absolute as to the replication of leave and license, defendant being at liberty to reply and demur.

FOWLER *et al.* vs. THE SCOTTISH EQUITABLE LIFE INSURANCE SOCIETY, & RITCHIE.

(4 Jur. N. S. 1169. Coram Stuart, V. C. 1858.)

Proposal for insurance, mistake in. Principal and agent. Policy void ab initio. Premiums ordered to be repaid by society. — By a verbal agreement, entered into in 1851, between the plaintiff K., and W. C., the agent in London of the S. E. Insurance Society, it was agreed that a policy should be granted to the plaintiffs R. and K. on the life of H., a merchant residing at Gibraltar, and that the policy should not be vitiated by reason of H. visiting, among other places, ports on the coast of Africa; and a proposal for the policy was drawn up by the plaintiff R., at the office of the society in London, and forwarded by the agent, W. C., to the chief office of the society at Edinburgh. In that proposal it was stated that the policy could not be accepted except on the condition that H. should be at liberty "to visit Tangiers, or any other port within the Mediterranean," without subjecting himself to any extra premium; but it was understood that he was not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia or Africa. The policy was effected, with a memorandum indorsed upon it in the terms of the above condition, and the plaintiff paid several premiums. H. went to a port on the Atlantic coast of Africa, and died there of apoplexy, within a short period — less than three months after his arrival. The S. E. Insurance Society refused to pay the insurance money, and thereupon an action was brought in the court of exchequer to recover the amount. The defence to the action by the society was, that the policy had become void by reason of H. having died at a port not within the terms of the agreement. On bill filed by the plaintiffs to have the mistake made in the indorsement on the policy rectified, the court *held*, that W. C., the agent in London, had no power to bind the society, and as the memorandum had been framed under a mistake; the real terms of the agreement never having been communicated to or adopted by the society, the policy was not binding upon either party; and the court ordered that the society should repay to the plaintiffs the premiums, and that the plaintiffs should thereupon deliver up the policy to the society.

THIS suit was instituted by William Cave Fowler, Lewis Reis,

Fowler v. The Scottish Equitable Life Insurance Society.

and Gustavus Adolphus Koenig, against the Scottish Equitable Life Insurance Society, and the principal agent of the society in London, for the purpose of having an alleged mistake, made in the first indorsement on a policy of insurance granted by the defendant, the Scottish Equitable Life Insurance Society, rectified according to the real agreement between the plaintiffs, Reis and Koenig, and the defendants, the society, so that the said policy should not be avoided by reason of Thomas Haire visiting any port on the coasts of Africa and Asia. The bill also prayed that the Scottish Equitable Society might be decreed to pay to the first named plaintiff the sum of £2,000, together with interest thereon from July the 7th, 1856, at the rate of £5 per cent. per annum, and that the defendants might be decreed to pay the costs of the suit. The case made by the bill was as follows: Thomas Haire, before and at the time of making the proposal and agreement for an insurance on his life, as after mentioned, was a merchant residing at Gibraltar, and in the course of his business was in the habit of making voyages to and visiting the ports of the empire of Morocco, and other ports in the Mediterranean, and on the coasts of Africa and of Asia. The plaintiffs, Reis and Koenig, carried on business as merchants in the city of London, and they agreed to open an account with, and to give credit to Thomas Haire for a sum amounting to £2,000; and that as he resided abroad, and had no property in this country whereon any moneys due to the plaintiffs could be secured, it was also agreed that they should, for the purpose of securing to themselves payment and satisfaction of any moneys which should become due from him to them, effect a policy of insurance on his life. The negotiation with the defendants, the society, for the grant by them to the last mentioned plaintiffs was conducted on their behalf by the plaintiff Koenig, and on behalf of the defendants, the society, by Captain William Cook, (who died on the 14th January, 1856,) who was at that time their London agent. The bill alleged that in the course of the negotiations the plaintiff Koenig and the said Thomas Haire gave notice and informed Captain Cook of the above facts and circumstances, and that they in terms stipulated with him that the policy proposed to be so granted on the life of the said Thomas Haire, whatever might be the language thereof, should not be vitiated by reason of Thomas Haire visiting the ports out of Europe aforesaid, and also the Havannah, which he was desirous of doing.

Captain Cook expressed his wish that the ports of Alexandria and the Havannah should be excluded from any license to be granted in any such policy ; but inasmuch as the said Thomas Haire had previously contemplated and agreed to visit both such last mentioned ports and places, the plaintiff Koenig insisted on such places not being excepted out of any such license as afore-said ; but eventually, and before the making of the said policy of insurance, *it was agreed verbally* between the last named plaintiff and Captain Cook that a policy on the life of Thomas Haire for £2,000 should be granted by the defendants, the society, to the plaintiffs Reis and Koenig, authorizing Thomas Haire to make voyages, in the way of his business, *to all or any of the ports* first above mentioned in and out of Europe, (*i. e.*, not including Alexandria and the Havannah,) but providing that Thomas Haire should not reside more than three months at any one time at any such port, and that he should not go into the interior of Asia or Africa ; the plaintiffs, at the request of Captain Cook, as such agent, agreeing to pay the defendants, the society, the customary extra premiums in case Thomas Haire should proceed to the Havannah. Upon the faith of this alleged agreement, and before any policy was made out, the plaintiffs Reis and Koenig paid to the defendants, the society, the sum of £60 10s. as one year's premium for the insurance. The policy of insurance which was actually effected was dated the 5th of January, 1852. It certified that the plaintiffs Reis and Koenig had been duly admitted members of the society, and that they, their executors, administrators, or assigns, should be entitled to receive out of the stock and funds of the society, at the end of six months after the decease of Thomas Haire, the sum of £2,000, &c., on the condition that they duly paid the yearly contribution (as afterwards corrected) of £60 10s. It further provided, " that in case Thomas Haire should depart *beyond the limits of Europe*, or should enter into or be employed in any military service, except within Great Britain or Ireland, or in any naval service whatsoever, then the present certificate should be void, and all claim to any benefit out of or interest in the funds of the said society in virtue of those presents should cease and determine, and all moneys that might have been paid in consequence thereof should belong to the society, excepting always in so far as relief was provided or might be lawfully granted by the directors of the society agreeably to the laws and

regulations thereof." The policy was signed by three directors of the company, and by Robert Christie, the manager at Edinburgh, the principal place of business of the society, on which was indorsed the following memorandum: "Edinburgh, Jan. 5, 1852. Notwithstanding the restrictions contained in the within policy, Mr. Haire will be at liberty, without license or extra premium, to visit Tangiers, or any other port within the Mediterranean; but it is understood that he is not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia and Africa." The bill also alleged that the plaintiffs accepted the policy without reading the same, and regularly paid the several annual premiums of £60 10s. thereon up to the decease of Thomas Haire, and one premium after his decease, believing the policy to be, upon the full confidence and assurance of Captain Cook, in all respects in accordance with the understanding and arrangement come to and concluded with him, and that such indorsement on the policy did not represent the actual agreement made between the plaintiffs and the society, but such indorsement was by mistake limited to Tangiers and ports in the Mediterranean, instead of extending to any ports on the coasts of Africa or Asia. By an assignment, dated the 9th February, 1856, the plaintiffs Reis and Koenig assigned the policy of insurance, and the whole benefit thereof, to the plaintiff, William Cave Fowler, and he thereby became entitled to the beneficial interest therein. Thomas Haire, in the course and for the purposes of his business, visited Casa Blanca, (otherwise Dor-el-Beida,) a small port on the Atlantic coast of Morocco, about 160 miles south of Tangiers, and he died there on the 7th January, 1856, within three months of his arrival. The plaintiffs, Reis and Koenig, at the request and for the benefit of the firstnamed plaintiff, brought an action in the court of exchequer against the defendants, the society, to recover the sum of £2,000, and interest thereon, from the 7th July, 1856, and also the one year's premium, which had been paid since Thomas Haire's death in ignorance of his decease. The defendants paid the amount of the premium into court, but insisted, as a defence to the residue of the action, that the policy had become void by reason of the visit of Thomas Haire to the port of Casa Blanca. The plaintiffs submitted that the actual indorsement of the policy was obviously incorrect, for it implied that Tangiers was a port in the Mediter-

raneean, which it was not. The bill prayed that the mistake made in the said indorsement might be rectified according to the real agreement made between the parties. The answer of the society stated a letter of the 2d January, 1852, addressed to the Edinburgh manager by Captain Cook, in which the writer asked that a special board might be called to consider whether a policy could be granted to Messrs. Reis and Koenig "on the terms specified in the proposal." This letter accompanied the proposal. The proposal stated that Mr. Haire was born and lived at Gibraltar, and that he had resided there all his life, except when travelling in Europe, Africa, and America. Messrs. Reis & Co. signed the printed declaration to the effect that the above particulars were correct, &c., and agreed "that the foregoing proposal, together with what was therein contained, and the present declaration, should be the basis of the contract between them and the society;" and they thereby declared their accession to the articles of agreement and constitution of the society, and to all the alterations thereof, and to the by-laws and regulations of the society. There was also the following attached to the proposal: "Memorandum. — If this proposal is accepted, it must be on the condition annexed to this proposal. I should think that an occasional visit to the various ports in the Mediterranean would rather be conducive to health than otherwise, and it should be an additional reason to accept the proposal, if not positively at variance with the established rules of the society. As Mr. Haire leaves England on the 7th inst., I must beg that a special board be called, and that the result may be communicated to me immediately, so as to enable the parties to effect the insurance elsewhere. — W. C." The condition so annexed, which was drawn up by the plaintiff Koenig himself, was as follows: "Mr. Haire to be at liberty to visit, on business, Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium, or having to apply for a license; but it is understood that he is not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia and Africa. The above memorandum to be indorsed on the policy. London, Dec. 31, 1851. — Lewis, Reis & Co." These proposals were accepted by the society. The society further said, that, save as by their answer appeared, they knew nothing whatever of the alleged negotiations between the last mentioned plain-

tiffs and Captain Cook, and they insisted that the indorsement was strictly correct, and that it did not by any means necessarily imply that Tangiers was a port in the Mediterranean. They further insisted that the policy had become forfeited by reason of Thomas Haire having died at Dor-el-Beida, and thereby committed a breach of the terms and conditions upon which the policy was granted. The plaintiff Koenig, by his affidavit, deposed to the conversation with Captain Cook, in which it was specially stipulated that the policy should not be vitiated by Thomas Haire making voyages to and visiting the ports of the empire of Morocco, such as Mozadore and Mazagan, (which places were specially named in the conversation,) and also other ports of the Mediterranean, and on the coasts of Africa and Asia. He also said, that if it had not been thoroughly understood by him on behalf of the firm, that Thomas Haire should be allowed to proceed to any of the ports and places in the Mediterranean, and the coasts of Asia and Africa, including the ports of Morocco on the Atlantic coast, that he might think proper, the firm would not have insured Thomas Haire's life; and that he could not have conducted his business without visiting those ports. Robert Christie in his cross-examination said, that in case any proposal had been made to which a condition was attached for license to visit any port on the coast of Africa, the directors would not, generally speaking, in his opinion, have entertained it on any terms. He further said he was not aware of any practice of insurance offices in London as to the payment of the sums insured when the lives insured had proceeded beyond the prescribed limits without the cognizance of the holders of the policies. The reason why the policy in this case was refused to be paid was because the insured went far beyond the limits prescribed, and died there. There was no other reason that he knew of.

Bacon, Q. C., & *Jessel*, were for the plaintiff, and submitted that the parol evidence produced in this case was sufficient to enable the court to rectify the mistake made by the general agent of the society. [The cases of *Motteaux v. The London Insurance Company*, 1 Atk. 545; *Henkle v. The Royal Exchange Insurance Office*, 1 Ves. Sen. 317; *The Countess of Shelburne v. Inchiquin*, 1 Bro. C. C. 338; *Ball v. Storie*, 1 Sim. & S. 218, 219; and *Alexander v. Crosbie*, Lloyd & G. temp. Sug. 150, and cases there cited, were referred to.]

Fowler v. The Scottish Equitable Life Insurance Society.

Malins, Q. C., & J. T. Humphrey, for the defendant, were not called upon.

Sir J. STUART, V. C. I cannot see that the plaintiffs have established their case. What they are required to prove is, that the defendants, the society, are bound by the terms of the agreement made by their agent, and that the plaintiffs are entitled to have the instrument which was executed by the defendants in their favor, and which they say does not correspond with the agreement made with the agent, rectified, so as to make it correspond with that agreement. The great argument on behalf of the plaintiff is, that Cook, the agent of the defendants, the society, in London, had power absolutely to bind those defendants as their general agent. The course of dealing, and the evidence in the cause, show that, whatever the general authority of Cook may have been as agent, what actually took place was this, — that the agreement which the plaintiff Koenig intended to make was to have its force and legal effect from an instrument to be executed in Edinburgh. The case of the defendants, the society, is, that Cook was their agent to negotiate the terms of policies in London, as their manager. But that Cook could, of his own authority, issue a policy in London, is contradicted by the evidence in the case, and cannot be established. The course of business was this : Cook, as manager in London, could negotiate the terms of a policy with any person desirous of effecting one with the society, but the policy itself was an instrument to be made in Edinburgh, which was the head-quarters of the society. The plaintiffs say that there was no necessity, after a complete agreement with Cook, for the granting of any policy at all, — that the society would have been bound by the agreement of Cook, and were bound just as completely as if the policy, under the seal of the society, had been given to the plaintiffs. That the plaintiffs might have had a remedy against Cook is perfectly plain ; but the transaction, as it appears in evidence, and in evidence under the plaintiff Koenig's own hand, is this, — there being a stipulation or proposal for a policy upon the life of the gentleman in question, it was agreed between Cook, as agent for the company, and the plaintiff Koenig, that there should be a waiver of some of the ordinary conditions of a policy, and that that waiver should consist in a license generally to go to ports in Africa, either within the Mediterranean or outside of the Mediterranean. That agree-

ment was made in plain and distinct terms ; but the proposal under the plaintiff Koenig's own handwriting was by mistake made in different terms. I think, to that extent, there is evidence to show that there was a mistake in what was written by the hand of that plaintiff himself ; for in that the proposal was limited to the ports of the Mediterranean and Tangiers. Now, that was a mistake to which unfortunately the plaintiff Koenig himself was a party, by being the person who, in fact, committed it himself. I do not say, however, that that would deprive the plaintiffs of the benefit of the doctrine of the court with respect to having an agreement rectified, if they could prove it, so as to bind the other parties. But here it is an integral part of the case that the policy could not be received until the sanction of the society in Edinburgh was obtained. It seems to me, therefore, an irresistible conclusion, that if the directors and manager in Edinburgh, seeing the terms communicated to them by the agent in London, had chosen to say, " We will not agree to the terms ; we object to this special waiver of the condition, and we decline to grant the policy," they would have had a perfect right to withhold the policy, and not to complete that which was a peculiar and extraordinary contract proposed to their agent in London, agreed to by their agent in London, and communicated by him to them, — a contract that must be consummated as an agreement by receiving the sanction of the Edinburgh body. The rest of the history of the case is very plain. The agent in London communicated this proposal in the erroneous terms given in the handwriting of the plaintiff Koenig himself. To that proposal, which was not the real agreement, the Edinburgh directors assented, and what is sought to be reformed is the memorandum which was signed by the Edinburgh agent, and adopted by the bill as that which constituted the agreement. That Edinburgh manager is now sought, under the decree of the court, to be made to sign, as having agreed to it, a certain stipulation of which he never heard. It seems quite enough to say that an agreement means that both contracting parties are of one mind. Here Mr. Christie, one of the contracting parties to the instrument which is now sought to be reformed, confessedly never heard of that which is said to be the real agreement. The result upon the whole is plain, that the agent in London agreed to something which he never communicated to his principals. The agent in London

communicated that which was a mistaken proposal. The plaintiff Koenig, who made the agreement with the London agent, never intended to be bound by the stipulation which he himself framed in a mistaken form. The result is, that there is no agreement at all. That being so, the plaintiffs seem entirely to have mistaken their remedy ; for in this case, there being no agreement, I think the plaintiffs altogether — both the assignees of the policy and the makers of the policy, who join as plaintiffs — have been paying premiums with the intention of acquiring a right which was never given or agreed to be given by those who are now sought to be bound. Cook, who is said to have been the agent, and who is said to have been the person with whom the agreement was made, is no party to the suit. The remedy is sought against the principals on the footing of Cook having been the general agent of the defendants, the society, and who might therefore bind them. In fact, the person sought to be bound is Mr. Christie, and the agreement sought to be rectified is that which was made by Mr. Christie, as the manager in Edinburgh. The plaintiffs have entirely failed in that, but I think that they have shown a case in which all the premiums paid must be repaid, as the mistake was occasioned by the mistake of the agent of the society in London. It is impossible to say that the suit was unnecessary, as without it the plaintiffs would not have got back the premiums.

The plaintiffs have failed in the full relief they claim, but I think they are entitled to have the premiums returned, and to have it declared that they were paid under a mistake.

Humphry. The bill asks nothing as to that. If that had been asked in a proper way, without suit, we should have taken it into consideration, as there is full power under the constitution of the society to do so.

Sir J. STUART, V. C. What you have to answer upon that is, that in an action upon the policy, your clients, instead of paying into court the whole premiums they have received, which would be an answer to a suit in the case of a vitiated policy, paid one year's premium only, being the last premium paid after the man died.

Humphry submitted that the court had no jurisdiction to order a return of the premiums, and that the bill ought to be dismissed, with costs. He contended that the plaintiffs had no

right to the insurance money, and no right to have the policy rectified.

Sir J. STUART, V. C., said that the plaintiffs sought relief upon the footing of a mistake. The mistake was proved, and it was more extensive than the plaintiffs' averment. The relief was sought upon the footing of a mistake, which appeared to vitiate the whole transaction.

Nov. 5. Sir J. STUART, V. C., now said he had framed the minutes in the following terms: It appearing to the court that the memorandum upon the policy of insurance in the bill mentioned is framed under a mistake, and is not in accordance with the terms agreed upon between the plaintiff Koenig and Cook, in the pleadings named as the agent of the defendants, and that the real terms of the said agreement were not communicated to nor adopted by the defendants, declare that the said policy is not binding upon the plaintiffs or the defendants, and order that the defendants do, within a month from the service of the decree, pay to the plaintiffs the sum mentioned, viz., the premiums paid to the insurance office; and order that thereupon the plaintiffs do deliver the policy to the defendants; and no costs upon either side.

FREME vs. BRADE.

(2 De G. & J. 582. Chancery: coram Lords Justices. 1858.)

Title to policy. Insurable interest. — J. being unable to pay the premiums of policies effected by him on his own life, gave to T. a post-obit bond for £14,000, payable on the death of J.'s father if J. survived him, and if T. had in the mean time kept up the policies. In fixing the sum of £14,000, regard was had not only to the amount of premiums required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of J. insured in the sum of £14,000, to be paid in the event of his dying in his father's lifetime. This was known to J., who knew also that T. intended to effect this latter insurance, but there was not any agreement that T. should do so. T. did effect the insurance. J. died in his father's lifetime, appointing T. one of his executors: *Held*, that no contract for T. to insure being proved, T., and not the estate of J., was entitled to the benefit of the policy which T. had effected.

Held, also, that if the transaction as to the post-obit bond was a fraud upon J., then T. had no insurable interest in J.'s life; the insurance office was not liable on the policy; and the sum insured could not, if paid by the office, be claimed by J.'s estate.

THIS was an appeal by the plaintiff from so much of a decree of Vice-Chancellor Stuart as dismissed the bill with costs as against the defendant Fryer, and as against the other defendants with costs, except as far as the bill prayed the common account

of the estate of R. P. H. Jodrell, the testator in the cause, and an account of the dealings and transactions between the defendants Brade and Trulock, and each of them and the testator in his lifetime.

The principal object of so much of the bill as was thus dismissed was to have it declared that a policy for £7,000 effected by Trulock on the life of the testator, and subsequently assigned to Fryer, and other policies also effected by Trulock on the testator's life, formed part of the testator's estate.

The testator was the eldest son of Sir Richard Jodrell, and if he had survived his father would, upon the father's death, have come into possession of considerable estates. By an indenture of the 12th of March, 1853, he assigned to trustees upon trusts for the benefit of the plaintiff, Lady Isabella Freme, then his wife, a policy of assurance on his own life for £5,000. By an indenture of the 8th of February, 1854, he assigned to trustees upon similar trusts another policy on his own life for the sum of £5,000, payable only in the event of his dying in the lifetime of his father. Towards the latter end of 1853, or the beginning of 1854, the testator found himself unable to pay the premiums on these policies, and an arrangement was come to by him with the defendants Brade and Trulock for the payment by them of what should become due for premiums, upon the terms of his giving them a bond payable in the event of his surviving his father. Accordingly in February, 1854, the testator executed a bond in the penalty of £28,000, which, after reciting the policies settled on the plaintiff, proceeded as follows :—

“ And whereas, it hath been agreed between the said parties, that the said R. P. H. Jodrell should execute and give unto the said James Brade and Thomas Trulock a post-obit bond for the payment of such a sum of money to the said James Brade and Thomas Trulock by the said R. P. H. Jodrell, in the event of his surviving his father, the said Sir Richard Paul Jodrell, to whom the said R. P. H. Jodrell is now heir apparent, as ought to be paid on such event, calculated on supposing that the said sums¹ so paid by the said James Brade and Thomas Trulock would be lost by them the said James Brade and Thomas Trulock by the

¹ No payment by Brade and Trulock had been previously referred to in the recitals.

death of the said R. P. H. Jodrell in the lifetime of the said Sir R. P. Jodrell ; and whereas it hath been calculated by Mr. , the actuary of the , that the sum of £14,000 ought to be paid to the said James Brade and Thomas Trulock, in the event aforesaid : Now the condition of the above written bond is such, that if the said Sir R. P. Jodrell shall depart this life in the lifetime of the above bounden R. P. H. Jodrell, and if until the happening of that event the said J. Brade and T. Trulock shall have kept up all the payment and payments due in respect of such policies, and well and sufficiently keep the same on foot, and the said R. P. H. Jodrell, his heirs, executors, or administrators, do and shall within the space of seven days next after the decease of the said Sir R. P. Jodrell, well and truly pay, or cause to be paid, unto the said J. Brade and T. Trulock, their executors, administrators, or assigns, the sum of £14,000, with interest for the same after the rate of £5 per cent. per annum, from the day of the death of the said Sir R. P. Jodrell, without any deduction or abatement whatsoever, then and in either of the said cases the above written bond or obligation shall be void : Provided always, and the condition of the above bond further is, that if the said R. P. H. Jodrell shall at any time or times hereafter within the space of six calendar months next after the day of the date of the above written bond or obligation, in case he, the said Sir R. P. Jodrell, shall be then living, be desirous of determining the above written bond or obligation, and do and shall well and truly pay or cause to be paid unto the said J. Brade and T. Trulock, their executors, administrators, or assigns, the sum of £1,000, with interest for the same after the rate aforesaid from the day of the date of the above written bond or obligation, together with all costs, charges, and expenses, but not exceeding in the whole the principal sum of £1,500, which shall or may have been incurred or sustained by the said J. Brade and T. Trulock, their executors, administrators, or assigns, in or about insuring the life of the said R. P. H. Jodrell against the life of the said Sir R. P. Jodrell, with lawful interest for the same sum or sums of money respectively after the rate aforesaid, from the time or respective times of paying or advancing the same, without any deduction or abatement whatsoever, then and in such last mentioned case the above written bond or obligation shall be void."

In this transaction, the understanding between Brade and Tru-

lock was, that Brade should pay half the premiums on the policies for £5,000 and £5,000, and also half the premiums on policies which it was their intention to effect on the life of R. P. H. Jodrell. Brade, however, was unable to perform his part of this arrangement, and another arrangement was come to between the testator and Brade and Trulock, under which the above bond was cancelled, and a new bond for the same amount was given to Trulock alone. This bond was dated the 16th of August, 1854. The penal sum was £28,000; it contained recitals of the policies settled on the plaintiff, and then it recited that "R. P. H. Jodrell being unable to keep the policies on foot, has requested the said Thomas Trulock to do so for him, and he, the said Thomas Trulock, has consented and agreed so to do, upon the conditions hereinafter contained, to which he, the said R. P. H. Jodrell has also consented and agreed." The condition of the bond was, "that if the said Sir R. P. Jodrell shall depart this life in the lifetime of the above bounden R. P. H. Jodrell, and the said R. P. H. Jodrell, his heirs, executors, or administrators, do and shall within the space of seven days next after the decease of the said Sir R. P. Jodrell well and truly pay or cause to be paid unto the said Thomas Trulock, his executors, administrators, or assigns, the sum of £14,000 of lawful money of Great Britain, with interest for the same after the rate of £5 per cent. per annum from the day of the death of the said Sir R. P. Jodrell, without any deduction or abatement whatsoever, and the said T. Trulock shall in the mean time and until the happening of such event have kept up the said two policies, and paid all the premiums due in respect thereof; then the above written bond or obligation shall be void."

Before the first of these bonds was given, Trulock consulted an actuary of eminence as to the amount for which the bond ought to be taken, having regard to the ages of the testator and his father. The actuary advised that the transaction was one which could not be rendered safe, and that no satisfactory estimate could be made, but that the sum to be made payable ought not to be less than £12,832. In making this calculation, the actuary took into account the premiums payable on policies to be effected on the life of the testator for insuring the sum of £14,000, to be payable in the event of his dying in the lifetime of his father, it being the intention of Brade and Trulock to effect such policies as a means of lessening the risk incident to the transaction.

At the time when the second bond was given, the testator also gave Trulock a mortgage on his reversionary interest in the family estate for securing the £14,000 upon the same event as was mentioned in the bond, subject, however, to a prior mortgage in favor of the Norwich Insurance Company.

In the months of August and September, 1854, Trulock effected in his own name various policies of assurance on the life of R. P. H. Jodrell, for sums amounting in the whole to £14,000. One of these was a policy for £7,000, which was assigned to the defendant Fryer by way of mortgage.

The only evidence connecting the testator with the effecting of these policies, beside the proviso in the first bond, was a letter written to him by Trulock on the 11th of August, 1854, shortly before the second bond was given. This letter, so far as is material, was as follows :—

“ I think we shall yet manage the business proposed shortly, and as for the post-obit, I am truly glad to say that I shall not ask you to increase it, for although they come in very slowly, I still think we shall get the insurances done at a price which will not make any further risk so much as was expected, and I would rather chance a little myself than alter a bargain once made, especially among friends.”

The testator died on the 12th of November, 1855, in the lifetime of his father, leaving a will by which he disposed of his real and personal estate upon trusts for the benefit of the plaintiff, and appointed Brade and Trulock his executors, who shortly after his death proved the will.

The defendant Trulock recovered at law upon two of the policies effected by him on the testator's life, one for £7,000 and the other for £2,000. The moneys payable under the others had not been received, and it appeared that they were still disputed.

The testator's widow, who had married again, filed the present bill by her next friend against Brade, Trulock, and Fryer, asking for an account of the personal estate of the testator, and of all dealings between him and Brade and Trulock, and that the trusts of his will and of the settlements he had made of the policies effected by himself, might be carried into execution. The bill sought for a declaration that the policies effected by Trulock formed part of the personal estate.

Vice-Chancellor STUART made a decree dismissing the bill with

costs as against Fryer, and also dismissing it with costs as against Brade and Trulock, except so far as it sought the usual accounts of the testator's estate and an account of the dealings and transactions between him and Brade and Trulock. The plaintiff appealed.

Mr. *Rolt*, Mr. *Bilton* & Mr. *Neale*, of the Common Law Bar, for the appellant, referred to *Lea v. Hinton*,¹ *Drysdale v. Piggott*,² *S. C.* on appeal,³ and *Gottlieb v. Cranch*.⁴

Mr. *W. Pearson*, for Brade and Trulock, and Mr. *Craig* & Mr. *C. T. Simpson*, for Fryer.

Where there is an agreement, express or implied, that the creditor shall insure at the debtor's expense, the debtor, on paying the debt, is entitled to the policies; *Morland v. Isaac*,⁵ *Drysdale v. Piggott*;² but nothing less will do; *Law v. Warren*,⁶ *Ex parte Lancaster*,⁷ *Gottlieb v. Cranch*;⁴ and the court will not readily infer a contract from slight circumstances. *Triston v. Hardey*.⁸ In the absence of contract a mortgagee cannot charge a mortgagor with the expenses of insurance; *Dobson v. Land*;⁹ the mortgagor therefore cannot have the benefit of the policy. If the transaction was a fraud on Jodrell, the result is that Trulock had no insurable interest in his life, so that the policies were void; and the fact that the offices have paid what they were under no obligation to pay, does not give Jodrell's estate any right. *Henson v. Blackwell*,¹⁰ *Law v. Warren*.¹¹ If A commits a fraud on B, and then by means of the result of such fraud obtains a benefit from C, B cannot recover that benefit from A. *Headen v. Rosher*,¹² *Potts v. Curtis*,¹³ *Aldbrough v. Toye*.¹⁴

Mr. *Rolt* in reply.

Judgment reserved.

The Lord Justice TURNER, after stating the nature of the appeal, said:—

The decree seems to be defective¹⁵ in not having directed an

¹ 5 De G., M. & G. 823; *ante*, p. 92. ² 22 Beav. 238.

³ 4 Week. Rep. 772; *ante*, p. 94.

⁴ 4 De G., M. & G. 440; *ante*, p. 86.

⁵ 20 Beav. 389; *ante*, p. 156.

⁶ 1 Drury, 31.

⁷ 4 De G. & Sm. 524.

⁸ 14 Beav. 232; *ante*, p. 83.

⁹ 8 Hare, 216.

¹⁰ 4 Hare, 434; *ante*, p. 50.

¹¹ 1 Drury, 31.

¹² M'Clel. & G. 89.

¹³ Younge, 543.

¹⁴ 7 Cl. & Fin. 436.

¹⁵ The answer of Brade and Trulock contained a statement which was not

Freme v. Brade.

account of the testator's estate received by the plaintiff Lady Freme and her husband, the defendant, Captain Freme ; and the general terms in which the bill has been dismissed seem hardly consistent with the other parts of the decree, for the dismissal extends to so much of the bill as prays the execution of the trusts of the settlements, but yet liberty is given to apply in chambers for the appointment of new trustees of those settlements. These, however, are no doubt mere accidental errors. The substantial question is, whether the policies of insurance referred to by the bill form part of the testator's estate. [His lordship then stated the facts of the case, and continued as follows] : —

This bill is so loosely framed that it is difficult to collect from it the precise grounds upon which the plaintiffs claim to have the policies in question considered as part of the testator's estate ; but in the course of the argument before us the claim was rested alternately upon the ground of fraud or of contract. As to the case of fraud, one part of the argument was that the whole transaction as to the security for the £14,000 was fraudulent and void as against the testator ; that Trulock had no insurable interest in the life of the testator otherwise than by virtue of that transaction ; and that the insurable interest having been acquired by fraud, the benefit arising from it would result to the person on whom that fraud was committed. The first step in this argument is, that there was fraud in the transaction as to the security for the £14,000 ; but upon the evidence before us I am not satisfied that this was the case. I think, however, that if the question had been material, we could not have parted with it without further inquiry upon the subject ; and we have to consider therefore whether, if the transaction as to the £14,000 was found to be a fraud upon the testator, the result contended for by the appellant would follow. I am of opinion that it would not. If there was fraud upon the testator in the transaction as to the £14,000, the defendant Trulock could acquire by it no insurable interest in the testator's life, and the policies effected by him were frauds on the offices in which they were effected : the offices would not be liable on the policies. These policies either formed

contradicted, to the effect that the plaintiff and her husband had appropriated part of the personal estate of the testator, and prevented the executors from receiving it.

part of the original transaction as to the £14,000, or they did not. If, as I think was the case, they did not form part of the original transaction, I can see no ground on which the testator's estate can claim the benefit of them upon the footing of fraud. If, on the other hand, they did form part of the original transaction, and we give the testator's estate the benefit of them upon this ground of fraud, we should, as it seems to me, be permitting the estate to affirm the transaction as to the offices, and disaffirm it as to the estate, which cannot, I think, be done. It is true that some of the policies have been recovered upon at law, but this does not seem to me to aid the appellant's case. If fraud be established, and it is the case of fraud we are now considering, what has been recovered could not, as I apprehend, be retained. It is, I think, to the offices, and not to the testator's estate, the money recovered would, in this view of the case, belong. There is, I think, a fallacy in the appellant's argument on this part of the case. It throws out of view all consideration of there having been a fraud upon the offices as well as upon the testator.

Then as to the case of contract, I find no proof of any express contract by Brade and Trulock, or either of them, for the insurance of the testator's life. The recital contained in the first of the bonds was relied on in proof of such a contract, but it seems to me to prove no more than that the premiums which would be payable for insurance were, as of course they would be, taken into account in determining the sum for which the bond was to be given. Nor does the proviso in this bond, as I think, afford any better proof of contract; it seems to me to show only that if insurances were effected, the bond was not to be determined under the proviso without the premiums being repaid. The letter of the 11th August, 1854, was also relied upon as evidence of such a contract; but again, this letter shows, as I think, no more than that the testator was informed that Trulock intended to insure, and that the amount of the bond was calculated on the rate at which the insurances were expected to be effected. There is indeed language in this letter which might be important on the question of fraud, had that question been material, but I do not think it at all supports the case of contract. It is not, I think, couched in terms at all indicating that Trulock was under any obligation to insure; and if a contract was to be inferred from

such a letter as this, there would hardly, I think, be any case in which the debtor would not be entitled to the benefit of the policies effected by the creditor. The bond and the letter to which I have referred constitute, as I believe, the only evidence which at all brings the testator in connection with these policies, and I think they are wholly insufficient to support the supposed case of contract.

It was also attempted on the part of the appellant to establish a right to these policies upon these grounds. It was said that the policies were effected upon the whole life of the testator, and not to meet the contingency mentioned in the bond; that they were collateral securities for the £14,000, and insured the payment of it in any event; and that it was a fraud to charge the testator with the £14,000 for the risk of his dying in his father's lifetime, and at the same time to secure the payment of the £14,000 in any event. But if there was no contract between the testator and Trulock in respect of the insurance, Trulock was surely at liberty to effect any insurance which he might think fit, and it is not to be wondered at that he insured the payment of the £14,000 in any event, when it is remembered how large an incumbrance the testator had already created upon his expectant property in favor of the Norwich Insurance Office.

Another ground which was relied on upon the part of the appellant was, that these premiums were paid out of the testator's own moneys; but the policies, the benefit of which is claimed by this bill, were effected by Trulock alone; and it does not appear that Trulock ever had any money of the testator in his hands except the £500 which was due upon his promissory note, and which was due as a separate and distinct transaction. This note the testator continued to hold until the time of his death, and I think it would be going much too far to ascribe the payment of the premiums to the debt which was thus due from Trulock.

Upon the whole, therefore, I think the appellant's case altogether fails, whether it be considered as depending upon fraud or upon contract; but I agree with what I understand to be the opinion of my learned brother, that the case fully justified inquiry, and that, except as to the defendant Fryer, the bill, so far as it has been dismissed, ought to have been dismissed without costs. In this respect, therefore, I think the decree should be altered; but in other respects I think the appeal should be dismissed, but of course without costs.

The case of *Lea v. Hinton*, which was attempted to be drawn into the argument on the part of the appellant, has not, I think, any bearing upon the point before us. In that case, as we thought, not only had the policy been effected with the privity of the testator, but it had been effected, and the moneys due upon it had been received, for the purpose of indemnity merely; and the estate having been charged, with part at least of the debt for which the indemnity was provided, was of course entitled to be credited with the indemnity fund.

The Lord Justice KNIGHT BRUCE. The decree in this cause having been so drawn up as to omit the direction of an account of the personal estate of the testator, Mr. Jodrell, possessed by the plaintiff Lady Isabella Freme and her present husband respectively, this defect must, I think, as the lord justice has said, be supplied, subject to which it appears to me that not one of the respondents has any ground of complaint against what has been done. It was right, as I conceive, to direct the accounts, or the accounts and inquiries, directed as to the defendants Messrs. Brade and Trulock, whether it would have been right to direct or do more against one or both of them or not.

The appellant's alleged grounds of complaint involve three questions: 1. Whether Mr. Trulock was a trustee absolutely or contingently of the whole or any part of the beneficial interest in the policy (of which the proceeds are in dispute) for the testator. 2. Whether there was a contract expressly or otherwise between them that absolutely or contingently the testator or his estate should have or be entitled to the whole or a portion of that interest. And 3. Whether, so far as the policy is concerned, the plaintiffs have the same rights, if any, against the defendant Mr. Fryer, as against Mr. Trulock. I have expressed myself thus, because the payment or non-payment by the testator, or with his money, or the charge or absence of charge against him of the whole or any part of the expense of effecting or keeping up the policy, is only material as evidence more or less strong on one or both of the two first questions that I have mentioned, of which neither can upon the materials at present before the court (I agree with the vice-chancellor and the lord justice in thinking) be answered in favor of the plaintiff; and the impression which for some time I had, that it would have been better not to decide either of the two first questions against her, at least with-

Jones v. The Consolidated Investment Assurance Company.

out an endeavor to obtain, by means of inquiries to be directed to the defendant, more information than we have as to the facts and circumstances of the dealings between the testator and the defendant Mr. Trulock relating to the policy, or connected directly or indirectly with it, does not remain. Upon consideration I have become convinced that there is not good ground for thinking that more information bearing materially upon the title to the policy than we have is likely to be obtained, or should be endeavored to be so. Agreeing in this respect as well as on the subject of course with the views of my learned brother, I concur in the order proposed.

With regard to *Lea v. Hinton*, the master of the rolls, if I may take the liberty of saying so, seems to me to have dealt ably and well with the matter, but certainly I might have expressed myself better than I did on the appeal. According to my recollection the evidence satisfied me that the effecting of the insurance then in dispute was, as between Mr. Lea and his solicitor, surety and executor, Mr. Hinton, their joint act—an act which the circumstances rendered it impossible to ascribe to any intention upon the part of either more favorable to Mr. Hinton than that of benefiting both; but as to Mr. Hinton, though primarily, yet in a way only of protection and indemnity. I think that it was right to charge him with the money with which at the rolls as well as here he was charged. From his case that of Mr. Trulock now before us is widely and importantly different, as was that of the policy holder in *Gottlieb v. Cranch*.

JONES vs. THE CONSOLIDATED INVESTMENT ASSURANCE COMPANY.

(26 Beav. 256. Coram Romilly, M. R. 1858.)

Suicide. Assignment.—One of the conditions of a life policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties for valuable consideration, six months before his death. *Held*, that a letter to the company charging it with a floating balance due to him, and made three years previous to the death of the assured by his own hand, was within the exception.

IN 1850 Edward Woolcott effected an assurance on his life with the Consolidated Investment Assurance Company for the sum of £600.

One of the conditions indorsed on the said policy was as follows

lows: "The policy of a person assuring his own life will become void if he dies by his own hand or by the hand of justice," &c., &c. "But should such policies have been assigned to other parties, for a valuable consideration, six calendar months before the death of the assured, they remain in force, to the extent of the beneficial interest therein of the parties to whom they shall have been so assigned."

Edward Woolcott was in the habit of obtaining advances of money from the plaintiff on bills of exchange and promissory notes; there was a current account between them, and the plaintiff held the policy as a security for the amount due to him, from time to time, on such account current.

In June, 1854, Edward Woolcott signed and gave to the plaintiff the following letter: "I hereby authorize and empower you to hold the policy of insurance you hold upon my life for £600 as security, in case of death or otherwise, for any notes of hand or bills of exchange you may have cashed for me."

The same course of dealing afterwards went on between the parties down to the death of Edward Woolcott, and the plaintiff continued to hold the policy as a security.

On the 10th of November, 1857, Edward Woolcott shot himself.

He was indebted to the plaintiff at the time in a sum exceeding £600. His debt consisted of the returned checks and the dishonored bills and promissory notes of Sanders & Woolcott, amounting (after deducting the amount received) to £1,080 10s. All the items constituting this balance were subsequent to 1856.

The plaintiff claimed the amount of the policy, but the company objected to his claim, and their solicitor stated that the objections would probably be the following: "1. That there was no assignment of the policy. Should this be waived,—as to which however we now offer no opinion,—2. Then the letter only covers the personal accommodation to Mr. Edward Woolcott, and has nothing to do with Sanders & Woolcott's unpaid checks or dishonored acceptances."

The company's solicitor afterwards stated the objections in the following terms: "Looking at the terms of the letter of 29th of June, 1854, 1st, it is open to doubt if it intended to relate to any bills beyond such as had been then cashed for Mr. Woolcott. 'You may have cashed for me' are the words. 2. In the next

place, as we have already stated, it is not an assignment under the condition indorsed on the policy. 3. Nor, if treated as an assignment, does it appear to come within the condition, as it was not 'for valuable consideration.' 4. Nor can it be contended, as we think, that advances to 'Sanders & Woolcott' are advances to Edward Woolcott."

The plaintiff instituted this suit against the company, praying a declaration of his right, and a decree for payment of the full amount of the policy out of the "stocks, funds, and securities of the company."

Mr. *Lloyd* & Mr. *Bagshawe, Jun.*, for the plaintiff, argued that the several objections above stated were untenable, and that it had been decided in this court that an equitable assignment of the policy was within such an exception as the present. *Dufaur v. The Professional Life Assurance Company*.¹

Mr. *R. Palmer*, & Mr. *Schonberg*, for the company, in opposition to the plaintiff's claim, relied on the several objections raised by the solicitor of the company.

THE MASTER OF THE ROLLS. I think the plaintiff is entitled to a decree in this case. On the first point, I think there was an assignment to the plaintiff "six months before the death of the assured," within the terms of the special condition. Here is a letter written on the 29th of June, 1854, and the question is, whether that is an assignment or not? I entertain no doubt that this letter constitutes an assignment in equity, where alone, as it is a *chose in action*, it could be assigned. That being so, it is clear that, in the terms of the condition indorsed on the policy, it "has been assigned to other parties," and that this assignment was made, not six months, but four years, "before the death of the assured."

I dissent from the doctrine, that, according to the terms of this letter, the assignment must be considered as constantly recurring, and that a fresh assignment would be required as each liability was incurred. It was given to a person with whom the assured intended to have dealings, as a security for the balance on the transactions.

As to the consideration, I think that the moment a sum became due from Edward Woolcott to the plaintiff, it constituted a good and valuable consideration for the purpose of supporting the as-

¹ 25 Beav. 599.

signment so made. It is true that if nothing had been due on it at the time, or if the balance had been on the other side, there would be no beneficial interest in the plaintiff or anything which this court could give effect to. But the assignment would be perfectly good, though the beneficial interest in the thing assigned, viz., the policy, might sometimes be very small and sometimes very considerable.

I do not therefore doubt that there was here a perfectly good and valid assignment, within the terms of the policy, and that it was made "six months before the death of the assured."

The next question is, what is the construction of the letter, because, if it is only a security for money then actually due, it will not cover subsequent advances. Though this is obscure, I do not think that such is the construction of the letter; but the parties themselves, in their subsequent dealings, seem to have put a construction on it of which it is susceptible, and which is favorable to the plaintiff's claim. The policy is to be held as a security, in case of death, "for any notes of hand or bills of exchange you may have cashed for me." This means not "now," but "then," that is, at any time when the event may occur. The policy was not taken back when the sum actually due at the date of the letter was paid off, but it continued for more than three years in the hands of the plaintiff, and the parties continued to deal with each other on the same footing and in the same manner as if the policy were a security for the floating balance; and on the death of Woolcott there were bills and notes which the plaintiff had cashed and discounted for Woolcott.

I am therefore of opinion, first, that there is a good assignment of the policy, and secondly, that it covers all notes of hand and bills which the plaintiff may have cashed for Woolcott at his death, and consequently, that, in respect of these, the plaintiff is entitled to recover.

Take a decree for what is due on that footing.

See *Cook v. Black*, 1 Hare, 390.

Stormont v. The Waterloo Life and Casualty Assurance Company.

STORMONT, executrix of William Stormont, vs. THE WATERLOO
LIFE AND CASUALTY ASSURANCE COMPANY.

(1 Fost. & F. 22. Exchequer, N. P. 1858.)

Suicide. — In an action on a life policy, to be cancelled in case of suicide by return of premiums: Plea, that the deceased died by suicide, and that the premiums were ready to be returned. The defendant held entitled to begin, the *onus* being upon them of proving that the death was by suicide, and they having put in the deposition of the widow and executrix, given upon the coroner's inquest, to the effect, that the day before his death the deceased had unaccountably gone out of his bedroom very early in the morning, and immediately afterwards had been found falling over the banisters; that later in the day, after he had complained of giddiness and pains in the head, he had been found suddenly falling out of a window, his wife being in the room at the time, and not being able to say how he came to fall out. Held, that there was a *scintilla* of evidence to support the plea; that the question upon it was, not merely whether the deceased threw himself out of the window, but whether, if so, he did it voluntarily, and not through confusion of his senses.

DECLARATION upon a life policy to be, in case of suicide, cancelled by return of premiums. General averment: that all things had happened to entitle the plaintiff.

Plea: that the said William Stormont did commit suicide; averment of readiness to return the premiums, which were paid into the court.

Replication: that the said William Stormont did not commit suicide.

Huddleston, (with him Gray & Jackson,) for the defendants, claimed, and was allowed to begin.

He called upon the coroner who had held an inquest on the deceased, proved that the plaintiff was examined before him, and produced the depositions.

The defendants then put in the plaintiff's deposition, as follows: "On the day before my husband's death I awoke and found him out of bed. I asked him to give me my medicine; he took the bottle, shook it, put it down and left the room. I got out of bed and heard screams from my children. I ran to the landing; they showed me my husband hanging by his legs on the rails. He did not speak. We got him over the rails. I asked him how it happened, but he could not tell me. He was up and down out of bed all day. He complained of crushing pain in his head. In the evening he was walking about his bedroom; I was with him when he fell. The window was wide open, and had been. I did not see him go to the window, but I saw him in the

Martin v. The Travellers' Insurance Company.

act of falling. He had been low spirited for some time. He did not appear himself. He had complained of giddiness."

The defendants here closed their case.

Piggott, Sergt., objected that there was no case for the jury.

CHANNELL, B., after having consulted Watson, B. There is a *scintilla* of evidence.

The plaintiff was then called, with other witnesses.

CHANNELL, B. The defendants were entitled to begin, because the burden of proof is upon them. They must prove that the deceased destroyed himself. The question is now for you, on the whole evidence, whether he threw himself out of the window voluntarily, or fell out of it involuntarily, through confusion of the senses or giddiness. The defendants plead that it was a voluntary act. Did he know that he was throwing himself out?

*Verdict for the defendants.*¹

MARTIN vs. THE TRAVELLERS' INSURANCE COMPANY.

(1 Fost. & F. 505. Queen's Bench, N. P. 1859.)

Accident insurance. Injury caused by lifting. — On an insurance against bodily injury by accident or violence, provided that the accident operated by external causes, insurers held liable for an injury to the spine, caused by lifting a heavy burden in the course of business. A surgeon called for the plaintiff, to whom he had given a certificate of serious injury, contradicting it, and alleging that it was collusively given, allowed to be treated as adverse.

ACTION on a policy of insurance against any bodily injury arising from any accident or violence, "provided that the injury should be occasioned by any external or material cause operating on the person of the insured."

Pleas: 1. That the plaintiff did not sustain any bodily injury by reason of an accident within the true intent and meaning of the policy.

2. That the accident did not cause any bodily injury to the plaintiff within, &c.

3. That the injury was not occasioned by any external or material cause operating on the person of the plaintiff.

4. That it was occasioned by the plaintiff exposing himself to unnecessary risk, &c., (according to a proviso in the policy.)

Shee, Sergt., & *Daly*, for the plaintiff.

¹ The case was moved, but a rule refused in Q. B.

Martin v. The Travellers' Insurance Company.

M. Chambers, E. James, Lush & Ellis, for the defendants.

In September the plaintiff, in the course of his business, lifted a heavy burden, and this was the alleged cause of the injury.

H., a surgeon, was called in, and on the 12th September gave him a certificate that he had severely sprained the muscles of the back, and that this prevented him from following his usual avocations.

On the 16th September, H. signed another and more formal certificate, in a form sent by the company, in which questions were asked, and in which he made this statement: "I certify that the party above named received from external violence an accidental injury to the muscles of the back—from a sprain—and that he is likely to be wholly disabled."

On the 27th September, H. gave the plaintiff another certificate, that he was not afflicted by any disease nor other disability, but that the accidental violence was the only cause of the disablement, and he considered him not able to resume his duties.

On the 28th October, H. again attended the plaintiff, and certified that his back was severely sprained, and that he was totally disabled.

H. now was called for the plaintiff, and gave answers tending to show that the injury had arisen from previous disease.

Shee, Sergt., put the certificates into his hands, and claimed to treat him as an "adverse" witness under the C. L. P. Act, 1854, sec. 22.

M. Chambers objected; but

WIGHTMAN, J., allowed it.

Evidence was given that the plaintiff had suffered from previous disease.

M. Chambers objected that the injury, even if arising from the sprain, was not an injury solely arising from material or external causes.

Sed per WIGHTMAN, J. The word "solely" is not in the policy. (To the jury): But, the question is, whether the injury really and substantially arose from the accident; if it did not, find for the defendants; if it did, find for the plaintiff.

Verdict for the plaintiff for the full amount.

HUTTON, executrix, vs. THE WATERLOO LIFE ASSURANCE COMPANY.

(1 Fost. & F. 735. Queen's Bench, N. P. 1859.)

Untrue but bonâ fide answers. Drunkenness. Medical attendant.—An action on a life policy was based upon answers by the assured to certain questions (*inter alia*): "If of sober and temperate habits?" "If aware of any disorder or circumstance tending to shorten life,?" &c. "Is there any other and what information touching the past or present state of health which the company ought to be made acquainted with?" "Name and address of ordinary medical attendant." It appearing that the assured had in the year preceding that in which the policy was effected, and in the very same year, been attended for the effects of severe drinking, on the last occasion (a month or two before the policy) for *delirium tremens*, of which he in two years' time died, and that the medical man who had attended him for several years before the policy, and down to his death, was not mentioned as the ordinary medical attendant: *Held*, that this justified a verdict for the defendants, even though the answer to the latter question was *bonâ fide*.

THIS was an action by the executrix of Thomas Hutton on a life policy effected by him with the defendants. The declaration set forth the policy, reciting that he had made a proposal and delivered a statement in writing, and signed by himself, dated 20th April, 1854, declaring thereby, *inter alia*, that he was in good health and ordinarily enjoyed good health, and was not aware of any disorder or circumstance tending to shorten his life, or to render an assurance thereon more than usually hazardous, which declaration the testator had agreed should be the basis of the contract between him and the company. Averment, that the declaration contained a true and faithful representation of the facts.

Plea: 1. That the defendants were induced to make the policy through and by means of the fraud and covin of the testator and others in collusion with him.

2. That the testator falsely and fraudulently replied to the defendants, for the purpose of inducing them to make the policy, that he was of temperate habits, and was not aware of any disorder or circumstance tending to shorten his life or render an assurance thereon more than usually hazardous; whereas in truth and in fact, as he at the time well knew, he was not of temperate habits, but was in the habit of drinking to excess, and was of drunken and intemperate habits, and was aware of a disorder, &c., having been ill of *delirium tremens*, and other disorders brought on by drunken and intemperate habits; by means of which false representation the defendants were induced to make the policy.

3. That the declaration, or statement in writing mentioned in the declaration, contained certain questions and answers thereto written by the testator, one of which questions was, "If of sober and temperate habits?" and the written answer thereto was "Temperate." That another question was, "If aware of any disorder or circumstance tending," &c., and the written answer thereto was "No." And that another of such questions was, "Is there any other and what information touching the past or present state of health or habits of life which the directors ought to be made acquainted with?" and the written answer thereto was "No." That another question was, "Name and address of ordinary medical attendant, to be referred to respecting past and present state of health," and the written answer thereto was "Dr. Cobb," &c. Averment, that the answers set forth were false, as the testator at the time he wrote the same well knew.

4. That the testator was of intemperate habits, and had been afflicted with *delirium tremens*, which were facts material to be known to the defendants, and which were not communicated to them.

Edwin James & Talfourd Salter, for the plaintiff.

Shee, Sergt., Huddleston & Beresford, for the defendants.

The written questions and answers as set forth in the third plea were proved; it being added by the assured, "I agree that the above shall be taken as a part of the declaration, which shall be the basis of the contract, and that any misrepresentation shall render the policy void." Immediately before, however, the question as to the usual medical attendant was this, "What has been the condition of health during the last five years?" Two referees — Wilson and Todd — wrote answers to similar questions as to the habits and health of the assured, to the same effect.

The policy was effected on the 1st July, 1854.

The assured died on the 28th November, 1856, and one Dr. Clifton certified his death as caused by *delirium tremens*.

Dr. Clifton was called for the defence, and stated that he had attended the deceased first in 1851, when he was suffering from rheumatic fever, and Dr. Cobb also then attended; witness had attended him at intervals from that time to the time of his death; frequently in 1853, and on one occasion in that year, when the police brought him home blind drunk. The witness stated that he should judge, from the condition of the deceased, that he had

been indulging for several days in drink, and that he was "much shaken" by it, but that it did not amount to an attack of *delirium tremens*. The witness further stated that he had attended the deceased frequently between 1853 and 1855, "about twice for the same attack;" about the end of 1855 "he was again ill from the same cause," and so in 1856. But the witness spoke to nothing in 1854; and, as to the occasion in 1853, admitted, on cross-examination, that he had not attended him again for some months.

Other evidence for the defence proved drunkenness down to 1854, but the distinct evidence stopped with that year.

Such was the evidence at the first trial before Lord Campbell, C. J., who told the jury that there was no evidence of *delirium tremens* before or at the time of the policy; and left the rest of the case to them. They found for the plaintiff, finding in answer to a specific question, that the statement as to Dr. Cobb was not false, coupling it with the previous question.

The court granted a new trial, on the ground that this finding was ambiguous, it not amounting to a distinct finding that the answer was true.

On the present occasion¹ the plaintiff, the widow of the deceased, (as before,) stated that Dr. Cobb had been the family doctor; she, however, admitted that on the occasion in 1853, Dr. Clifton was called in at Dr. Cobb's request, and could not say that he had not attended her husband several times in each of the subsequent years; but she said if he had been seriously ill she should have sent for Dr. Cobb.

But it did not appear that, in fact, Dr. Cobb had ever been called in since 1853.

The report of the company's medical officer (who had been called at the first trial) was called for on the part of the plaintiff, and tendered in evidence.

Shee, Sergt., objected, unless the medical man was himself called.

COCKBURN, C. J., admitted it, but said he should tell the jury to attach no weight to it in the absence of the medical man. The case for the defence mainly rested on the evidence of Dr. Clifton,

¹ Interrogatories were allowed before the second trial, addressed to the manager for the defendants, and directed to the point whether they did not make inquiries as to the truth of this answer, but nothing was elicited.

Cazenove v. The British Equitable Insurance Company.

who stated he attended the deceased in January, 1854, for a drinking bout; "and off and on" until near the end of February. That he attended him in May, 1854, for *delirium tremens*; and again in September for indigestion.

The medical officer who examined the deceased and took his answers at the time of the proposal, was called for the defence, and stated that he had made his report mainly on those answers, but that the deceased appeared healthy, and did not betray any symptoms of drinking.

COCKBURN, C. J. (to the jury):—

1. Was the deceased, at the time of the proposal or of the policy being accepted, a man of temperate habits?

The jury found in the negative.

2. Had he had *delirium tremens*, or any disease tending to shorten life, or made the assurance more than usually hazardous?

The jury found in the affirmative.

3. Was the representation as to the usual medical attendance true?

The jury found in the negative.

4. Was it *bonâ fide*?

The jury found in the affirmative.

Verdict for the defendants on the first and second issues.¹

CAZENOVE & others, assignees, &c. vs. THE BRITISH EQUITABLE
INSURANCE COMPANY.

(5 Jur. N. S. 1309. Common Pleas, 1859.)

Untrue representation.—If a policy of insurance be granted on the life of A, subject to the condition, that if any fraudulent or untrue statement be contained in any of the documents addressed, &c., to the insurers in relation to the insurance by A, then the policy to be void; and A gives, in one of the documents required by the insurers, written answers to questions respecting his bodily health, &c., amounting to a negation of his ever having had any serious disorder requiring confinement, except one particularized as being of a week's duration, &c., when, in fact, he had had, subsequently to this, another attack of illness, under which his life was in danger, &c.; he makes an untrue statement within the meaning of the condition, and so avoids the policy, although the jury find that there was no intention to deceive, and no material information withheld.

THIS was an action by the plaintiffs, as assignees of one Thomson, a bankrupt, deceased, against the above named insurance com-

¹ *Edwin James* moved in Hilary term, but took nothing.

pany to recover £500, for which he had insured his life with the company. The declaration stated that in the lifetime, &c., the said company, by deed under their common seal, dated the 6th March, 1857, covenanted with him, that they, the said company, or their successors, if their corporate funds, property, and effects for the time being, including the amount subscribed for, and not paid up, if any, after satisfying all prior claims and charges thereon, should be sufficient for the purpose, and if the current premium should have been paid, and the other regulations indorsed thereon should have been observed by the person entitled to the benefit of that insurance, would, within two calendar months next after satisfactory proof should have been made, according to the rules, regulations, and practice of the said company for the time being, of the death of the said Thomson, pay unto his executors or administrators the full sum of £500 sterling, and all such other sums, if any, as the said company, by their directors, might have ordered to be added to such amount, by way of bonus or otherwise, according to their practice for the time being; provided always, that that policy was made subject to the conditions and regulations thereon indorsed; and the said Thomson afterwards departed this life, and satisfactory proof of his death was, more than two months before, &c., action, made, according to the rules, &c., of the company for the time being, and all current premiums, &c., were paid, and all the conditions, &c., performed; and at the time of the said death, and thenceforth continually, the corporate funds, &c., of the company, &c., including capital subscribed for, &c., after satisfying all prior claims, &c., were sufficient, &c., and the time has elapsed, and all things have taken place, &c., necessary to entitle the plaintiffs, &c. Breach, default in payment of the £500, &c. Pleas: first, that one of the said conditions and regulations indorsed on the said policy was and is to the tenor following, *i. e.*: “No. 4. In case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with, the company in relation to the within insurance, whether by the payee, the insured, or any referee or other person, then this policy shall be void; but in case of a mere accidental erroneous statement of the age of the insured, the said company (provided application shall be made within three months after discovery of the error and proof shall have been given, to the satisfaction of their directors, that no fraud was intended) will waive such

forfeiture on such terms as the said directors shall impose, by an indorsement on this policy under the hand of their manager or of their chairman ;” and the defendants say, that before and at the time of the making of the said policy divers fraudulent statements were contained in two certain documents addressed to, and deposited with, the said company, by the said Thomson in relation to the said insurance, &c., (the said statements being other than a mere accidental erroneous statement,) of the age of the said Thomson, whereby the said policy was and is void. Secondly, that one of the said conditions, &c., was and is to the tenor of that set forth in the first plea, and before and at the time of the making of the said policy divers untrue statements were contained in two certain documents addressed to and deposited with the said company by the said Thomson in relation to the said insurance, &c., (the said statements being other, &c., as before,) of the age of the said Thomson, whereby the said policy was and is void. Issues thereon. The cause came on to be tried, before Byles, J., at the Liverpool spring assizes, when it appeared that Thomson, having proposed, on the 22d December, 1856, to insure with the defendants, was required to answer certain queries contained in their printed “form of proposal.” The two material questions and answers are as follows :—

Question 7. “Have you ever, and when, been attended by a medical man?” Answer. “About two years ago.” Question 8. “Names and addresses of the usual medical attendant, and the last medical attendant?” Answer. “Names, Mr. Craigie ; addresses, Birkenhead. Have known the party two years.” N. B. “Date of professional attendance” left unanswered.

Thomson subscribed the above in the terms required by the company, viz. : “I declare that the above particulars are true, and that I have withheld no material information,” &c. This was signed, “Ralph Hardie Thomson.” Besides the questions in “the form of proposal,” he was required to answer others contained in what is called “the personal statement,” which was directed to be made to the medical officer of the company, and to be signed by the party whose life is proposed for insurance. This document, so far as material, was in the following form :—

(“N. B. It is particularly requested that precise answers may be obtained to each inquiry.)

“Q. 2. Whether had any, and which, of the following diseases,

viz. rheumatism, gout, shortness of breath, asthma, palpitation of the heart, fainting, giddiness, headache, fits, epilepsy, consumption, spitting or other discharges of blood, scrofula, cancer, piles, stone, gravel, stricture, rupture, insanity, delirium tremens, dropsy? A. No."

"4. Whether had, since infancy, any and what other disease requiring confinement? No.

"5. Whether had any tumor or swelling of any kind? State its nature and position. No.

"6. Whether had any, and what, accidents requiring confinement? Nose fracture at school.

"7. If ever engaged in any, and what unhealthy business or pursuit? No.

"8. How often has medical attendance been required? Two years ago.

"9. How long did such attendance continue? About one week.

"10. For what disease or diseases? Disordered stomach.

"11. For what period confined to the house or bed? A week.

"12. How long is it since these circumstances occurred? Two years.

"13. Name and address of the medical attendant or attendants employed on occasion of such disease? Dr. Roper, Rockferry, Cheshire."

"16. Whether of strictly temperate, or intemperate, or free habits? Temperate.

"(General question.) Do you know of any, and what, other circumstances connected with your family, habits, constitution, health, or condition, which may tend to affect your life? No.

"Is there any other circumstance which the officers of the company ought to know? No."

"I declare all the above answers to be correct and true.

(Signed,)

"R. H. THOMSON.

"(Date) January 6, 1857."

On the faith of these answers the company executed and issued the policy for £500 on the 6th March, 1857, (as in the declaration,) with the fourth condition (as above) indorsed thereon. At the trial the first plea was abandoned, so far as the imputation of fraud was concerned, and the company relied solely on the untruth

of the statements alleged in the second plea to be contained in the answer given in the above documents as making void the policy. Thomson, it appeared, was dyspeptic, and in 1855, in December, had a decided disorder arising from dyspepsia, — a bilious attack, — for which he was attended by a medical man, Dr. Roper, of Rockferry; he recovered, and went to Dublin; returned home to Birkenhead; had a renewed attack, and was attended from the 2d January, 1856, till the 8th, by Dr. Craigie, and recovered his usual state of health, in which he remained till the 5th of February, the same year, when he had a fresh attack of the same character while at Birmingham, and became dangerously ill, and was attended by two medical men, Dr. Fletcher and Dr. Palmer, from the 15th February till the 21st. However, he again recovered; he returned home, and in December, 1856, made proposals to the company for the insurance of his life, remaining in good health from the time of his returning home up to December, 1857. About the latter end of that year he had become insolvent, and his circumstances at that time preyed a good deal on his health. He was subsequently attended by Dr. Craigie for hepatitis, an inflammatory affection of the liver, of which disorder he died in April, 1858. The plaintiffs were appointed his assignees on his bankruptcy in 1857. The learned judge left to the jury to say whether it was material that Thomson should give the names of his two medical attendants at Birmingham, and whether he suppressed any information with respect to his sickness there, either as a material misstatement or material omission in “the personal statement” or “the proposal.” The jury found that no material information had been withheld, and a verdict was entered for the plaintiffs, leave being reserved to the defendants to enter it for them on the second plea, if the court should be of opinion that the statements in “the proposal” and “the personal statement,” relied on by them, were untrue, so as necessarily to avoid the policy.

Atherton, Q. C., having obtained, on a former day, a *rule nisi* accordingly,

Edward James, Q. C., & *J. Henderson*, for the plaintiffs, now showed cause. Thomson died of a disease not mentioned in “the proposal” or “personal statement,” and not one to which he was shown or known to have been subject before. [BYLES, J. The question made really is, how far the case in the house of lords (*Anderson v. Fitzgerald*, 4 H. L. C. 484) binds us.] The prin-

principal question put to the insurer was, "Have you ever, and when, been attended by a medical man?" and it was answered, "About one year ago;" for that was admitted by both sides to have been the real answer, though by a mistake in the copies it appeared to have been *two* instead of *one*, &c., that was replied, and that reply was true. Then he was asked for the names and addresses of the usual medical attendant, and the last medical attendant, and he replies, "Mr. Craigie, Birkenhead; have known the party two years." That is an omission to answer one of the questions, the last; but a correct answer of the other. [COCKBURN, C. J. No person could help assuming, on this answer, both that Craigie was the last and his usual medical attendant.] It is contended that the whole of the case shows him to have been only answering the first part of the question; he states truly who was his usual medical attendant; he does not answer the last question at all. [COCKBURN, C. J. Suppose the questions had been separately put, and the insurer had put a bracket, and thus made his single answer apply to both, would that be a true statement?] In that case it must be admitted it would not. [CROWDER, J. By putting "names" in the plural, it seems to be assumed that there might be one medical man, the usual attendant, and the other the late attendant; and if so, then, if the insurer meant that in his case they were the same person, he ought to strike out the "s."] The "date of the last professional attendance" being left unanswered shows that it was not meant to represent Craigie as the last professional attendant. In the case in the house of lords, (*Anderson v. Fitzgerald*,) Lord St. Leonards says, "I think that your lordships, and every court of justice, should endeavor to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure, if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, that that very important branch of insurance — life insurance — will become very distasteful to the people, and that no prudent man will effect a policy of insurance with any company without having an attorney at his elbow, to tell him what the true construction of the document is." As to "the personal statement," the objection to the answer to the question, "whether, since infancy, he had had any, and what diseases," ought not to

prevail, because fraud not being imputed by the other side, nor intention to deceive, the court will place the fair construction on such answer. It is found by the jury to be immaterial to mention the disorder at Birmingham, and to mention the names of the medical men who attended the patient there; the question was left to them in as fair a way as it could be. [COCKBURN, C. J. Perhaps the jury might think it immaterial, because he did not die of that complaint.] The jury, at any rate, found that everything stated was true. The question points to a disease which has a peculiar type and character, not whether he had a belly-ache, arising from a surfeit of food or drink; not whether he had occasional dyspepsia.

Following the whole of the questions and answers together, there is no untrue statement made. The company were referred to both Craigie and Roper in respect of the disorder which had happened a year before the date of "the proposal," &c. *Anderson v. Fitzgerald* is claimed on the other side as a decision in their favor; but it is not all-fours with this as to the facts, and the declaration there was materially different. If the questions are so framed as to lead to ambiguous answers, the court, as Lord St. Leonards points out, must construe those answers favorably for the party insuring, and against the company. There is no misrepresentation here; for misrepresentation means a representation known to the person making it to be untrue, which is not the case here. [Atherton, Q. C. At the foot of "the personal statement" he avers all his answers to be "correct and true."] — [BYLES, J. It would seem, from *Anderson v. Fitzgerald*, as I read it, that if a man says he has had 365 days' illness, and, in fact, he has had 364 days 23 [hours, 59] minutes 59 seconds, that is an untrue statement, and vitiates the policy.] It is perfectly true that he was ill about a year before the date of the policy, though he might have been unwell at other times. [BYLES, J. It is not omission, but untrue statement, that is pointed at in the conditions. The jury have found that no material statement has been withheld; therefore they have taken you out of the effects of the declaration at the end of "the personal statement."] Treating the answers as those of a man intending to speak the truth, — and the jury have found that there was no intention to deceive, — the court can have no difficulty. As to the first point, then, there is not necessarily any untruth; as to the second, there is no untruth; substantially, there is truth, on the whole.

May 9. *Atherton*, Q. C., & *Quain*, in support of the rule. The question is entirely one of construction of these written documents, for there is no dispute on the facts *dehors*. As to "the proposal," on his return from Dublin, in 1855, he was first attended by Roper; then he is attended for about six days, in January, 1856, by Craigie; in December following he makes "the proposal," and subscribes "the personal statement" a year after Craigie had ceased to attend him. In February, 1856, the deceased takes a journey to Birmingham, and there is ill, and attended by two medical men; and in no proper sense is the attack at Birmingham the same as the attack for which he was attended at Birkenhead by Craigie. Therefore the answer to the question requiring the name of the last medical attendant cannot be true, if, as the defendants contend it is, that question is answered at all. The ground will not be shifted by the court from that taken up in *Anderson v. Fitzgerald* — the ground, namely, of the absolute truth or untruth of the representations — to that of the materiality of the truth or untruth of those statements. If a statement is untrue, it is not the less so because a person has taken all opportunities of giving information, and believes entirely that he is giving a true description, and speaks with the most honest intention. The court is not embarrassed by any reference to fraud or otherwise in this case. The distinction was plainly present to the minds of the lords in *Anderson v. Fitzgerald*, where "false" was used in that case; in this "untrue" is used. The issue in this case is true or untrue; that is, not true in point of fact. [WILLES, J. The context of the conditions here, and the proviso in the case in the house of lords, is not the same apparently. In the fourth condition the words are "fraudulent or untrue;" that is, untrue in a sense like that of the words that have gone before, *i. e.*, a material untruth; it cannot, as it seems, be taken in the sense that "fraudulent" means nothing more than that the statement is deceptive; it is a matter *dans causam contractui* that is meant. In *Anderson v. Fitzgerald* the word "fraudulent" did not occur in the context with "false or untrue." — CROWDER, J. If every untrue statement vacates, what is the use of inserting "fraudulent?"] As Byles, J., put it at the trial, if "fraudulent" had stood alone, the company would have been doing no more by their condition than the law would have done for them without that stipulation. In

Anderson v. Fitzgerald, Lord Brougham comes to the conclusion, upon the construction of the whole document, that "false" meant simply "untrue;" and Lord St. Leonards comes to the same conclusion. But the thing asserted there was to be used in or about obtaining or effecting the insurance; here the term is, "any fraudulent or untrue statement contained in any document in relation to the within insurance;" it is in that connection that the answers are to be true, and it is stipulated that untruth of this kind shall vitiate. That distinguishes this from the case in the house of lords, where the fraud was to be fraud used in obtaining the insurance. Then the circumstances of the previous health of the insured are surely material for the office to be informed about, and therefore they may well say, "We will know who is the usual medical attendant." They have a reasonable right to both names. [COCKBURN, C. J. The second question in "the proposal" is very difficult to answer at all.] If it had not been proved that, in point of fact, the deceased had been attended by Fletcher and Palmer at Birmingham, then Craigie would both have been the last and the usual medical attendant. The questions in "the proposal" are framed both against answers intended to deceive, and those which do deceive, whether intended or not; and the question here is, was the answer calculated to deceive the company when sent in? Here the insured has managed to keep from the knowledge of the office the worst illness he ever had, and the last also. That cannot have been according to the understanding of the company at the time of granting the policy, and therefore the contract is void. There is fraud in that — fraud in law; for fraud in fact is where there is intention; fraud in law may be without intention. [WILLES, J. I deny that to be a distinction in our law.] *Milne v. Marwood*, (24 L. J. C. P. 36,) seems to involve that distinction; so *Polhill v. Walter*, (3 B. & Ad. 114.) [WILLES, J. In chancery the distinction has sometimes been made; and there is a very late case in which it is maintained; but that doctrine has never yet found its way into the common law courts.] The answer must be considered according to the understanding of those to whom it is given; if it is to be what the insured intended should be understood by his answer, then every defence of every insurance office is hopeless. Certainly there are untrue statements in these documents, — *any* untrue statement in which is to

Cazenove v. The British Equitable Insurance Company.

vitiate ; and a statement is not the less untrue because the party making it is not apprised of its untruth. *Duckett v. Williams*, 2 Cr. & M. 348.¹ [WILLES, J. As to the words "fraudulent or untrue," in the fourth condition, the phrase can only mean, "by statement or silence, fraudulent or untrue" with respect to matters material to the contract. You say "untrue" means here "false in fact, without regard to intention ;" but if "fraudulent" is confined to that which is material, why is not "untrue" to be confined to what is material ?] The word "or" is to be understood as conjoining opposites — negating that the terms are used as convertible — excluding that which is fraudulent from that which is untrue.

COCKBURN, C. J. The rule must be made absolute. This action is on a policy of insurance, for which there is a condition, that any fraudulent or untrue statement being made in the documents deposited with the company in relation to the within insurance by the insured, then the policy shall be avoided. Now, looking at what is called "the personal statement," we find that one of the questions is an inquiry, whether, since infancy, the party proposing for insurance had had any, and what diseases requiring confinement ; and the deceased answered, simply and emphatically, "No." Now, if that had stood alone, and there had been nothing to qualify it, then upon the evidence it is clear, beyond all possibility of controversy, that this is an untrue answer — untrue, that is, in point of fact — and therefore it remains to be seen if there is anything in the remainder of the case to qualify this answer, so as to make it reconcilable with the truth. Now, the document proceeds — [Here the lord chief justice read the 8th, 9th, 10th, 11th, 12th, and 13th questions, with the answers to each, as set out above, and proceeded :] To these questions, these answers being given, the plaintiffs contend that the answers to these questions so qualify the previous absolute denial as to make it consistent with the truth. I think that they do not. The insured refers, in these last answers, only to the illness for which he was attended by Dr. Roper, in December, 1855, and not to his last illness — a very far more serious illness — when he was attended, not by Dr. Roper, but by two medical men, and also by a surgeon, at Birmingham. I think, therefore, that the whole amounts to this : we have in "the personal state-

¹ *Ante*, p. 8.

ment" a positive denial by the insured of any disease requiring confinement, with the exception of one, when he was attended by Dr. Roper. Now, that is not true; because in a short time after that illness, in which he was attended by Dr. Roper, he had another and very serious illness, lasting for several days, during which period his life was in danger, and he was attended by three medical men. Therefore I think the answers given fall short of the truth, and therefore do not comply with the condition; and that being the view I take of the statements of the insured in "the personal statement," it becomes unnecessary to consider the answers to the questions contained in "the proposal," where a similar legal question arises, which it is not easy to solve, and which, as I have said, it is not necessary for me to enter upon.

CROWDER, J. I also am of opinion that it is not necessary to enter upon the case of the answers in "the proposal," because I found myself on the answers to "the personal statement." Now, in that document the insured states what amounts to a negation of his having had any disease than that which he mentions. I think, therefore, that he kept out of view, and from the knowledge of the office, his illness at Birmingham, in which his life was in danger, by a positive negation of any other illness than that for which Dr. Roper had attended him. Therefore the statement in this document is untrue, and so within the fourth condition, and vitiates the policy.

WILLES, J. I am of the same opinion. Taken together, the answers in "the personal statement" amount to a denial of any illness coming within the description of that which actually took place in February. It is not a mere omission. Such answers are given as would mislead anybody. The obligation to give proper answers would have made it the insured's duty to mention every illness that he had had, such as that of February.

BYLES, J. I am of the same opinion. I think that the documents must be interpreted by the law as established in *Anderson v. Fitzgerald*, and that if there be in them any statement made by the insured which is incorrect, and irreconcilable with facts, be they material or immaterial, the policy will be void. I wish to forbear from giving any opinion as to the question which arises on "the proposal," and is a serious difficulty in the way of the plaintiffs. But in "the personal statement," the answer in effect is, "I never had any serious disorder requiring confinement, but

I was confined to my bed for a week once, when Dr. Roper attended me." Now, this is first negating any serious disorder, and then putting in one exception, and one exception only, specified and particularized by the description of his having been in his bed a week, and been attended by Dr. Roper. That leaves a general negation still remaining — not a mere omission, but a fraudulent negation. The defendants, therefore, are entitled to the verdict on the fourth plea. *Rule absolute.*

NOTE. — This judgment was affirmed

IN THE EXCHEQUER CHAMBER.

(6 Jur. N. S. 826. 1860.)

The opinion was delivered by

POLLOCK, C. B. At the trial the jury found that no material information had been withheld, and the verdict was taken for the plaintiffs, with leave to move reserved to the defendants to enter it for them if the court should be of opinion that the statements were untrue, so as necessarily to avoid the policy. Then the parties must be taken to assent to this, that the court was to say whether these were true answers or not. An answer may in one sense be said to be true, namely, if as much as it does state is not untrue, but it may nevertheless be substantially an untrue statement. I think that this answer is untrue ; just as when a man is asked how old he is, and he says he is thirty, and as he is that, and something more than that, it may be said, in a sense, that the answer is true. However, in a case of this sort, I think it is trifling to say that it is a true answer, if something more is to be added to make it true.

Judgment affirmed.

See note to *Anderson v. Fitzgerald*, ante, vol. 2, p. 364.

PFLEGER vs. BROWNE.

(28 Beav. 391. Coram Romilly, M. R. 1860.)

Composition with creditors. Burden of proof. — Composition arrangements with creditors form an exception to the rule, that an agreement to accept part of a debt in discharge of the whole is no legal satisfaction of the remainder.

If, upon a composition between a man and his creditors, one accepts the composition, and, in addition, agrees that the debtor shall keep up a policy on his life for the ultimate payment of the remainder of the debt, such an agreement is void, unless every creditor assents, and the policy belongs to the representatives of the debtor.

Where A pays the premiums upon a policy on his life, but the benefit of it is claimed by B, the onus of proof lies on the latter, even though the policy stands in his name.

ON the 21st of April, 1837, Christopher Pfleger effected a policy on his life for £500. In 1848 he became hopelessly insolvent, being indebted to William Browne and his partner in £318 9s.

9*d.*, and to other persons. In September, 1848, Browne & Co. well knew the state of Pfleger's affairs, and promised to accept 1*s.* 6*d.* in the pound, and to induce others to do so.

On the 22d of September, 1848, Browne and Pfleger induced the insurance office to issue a new policy for £500 on Pfleger's life, in substitution for the old one, but payable to Browne, and the premiums were, like the old one, made payable on the 21st of April.

On the 18th of September, 1848, Messrs. Browne received the composition of 1*s.* 6*d.* in the pound, on their debt. The like composition was received by the other creditors, but no composition deed was executed.

It was not proved distinctly that any communications had taken place between Messrs. Browne & Co. and the other creditors.

From 1848 down to the death of Pfleger, in 1857, the premiums were paid, in the first instance, by Browne, and afterwards repaid by Pfleger. On Pfleger's death, Browne received the £500 on the policy, and he claimed to retain the remainder of his debt and interest out of it.

Pfleger's widow and administratrix instituted this suit, in 1858, against Browne, praying a declaration that he was a trustee of the policy for Pfleger, and for consequent relief.

The defendant insisted that the contract between him and Pfleger was, that in addition to the composition, the policy was to be kept up by Pfleger for the benefit of the defendant, for the purpose of ultimately securing his debt.

Mr. *Lloyd* & Mr. *Beavan*, for the plaintiff, argued, first, that no such agreement had been proved as was alleged by the defendant; that a policy *prima facie* belonged to the person who paid the premiums, and that, therefore, the defendant was bound clearly to displace that presumption; secondly, that even if there had been such an agreement, it was void, as a fraud on the other creditors, and contrary to the policy of the law. *Cullingworth v. Lloyd*.¹

Mr. *R. Palmer* & Mr. *Cole*, for the defendant, argued that the agreement had been established, and was consistent with the probabilities in this case. That the cases relating to frauds on composition deeds depended upon there being some common contract

¹ 2 Beav. 385.

and communication between the creditors, or upon a deed extinguishing the debt and releasing the securities; but that here there was no common contract, and therefore no fraud on the other creditors or on Pfleger, and that there was no necessity to communicate to the other creditors that an additional benefit, beyond the composition, had been stipulated for. That a debt could not be extinguished, or the collateral securities released at law, by part payment.

Jackman v. Mitchell,¹ *Fawcett v. Gee*,² *Coleman v. Waller*,³ *Lee v. Lockhart*,⁴ *Cullingworth v. Loyd*,⁵ *Thomas v. Courtney*,⁶ *Heathcote v. Crookshanks*,⁷ *Down v. Hatcher*,⁸ *Fitch v. Sutton*,⁹ were cited.

The MASTER OF THE ROLLS, (without hearing a reply.) I am of opinion against the defendant upon both points.

In the first place I think the burden of proving the agreement alleged by the defendant lies upon him, and I do not think he has established it, although, if the case rested upon that point alone, I should be disposed to put the matter in a further course of inquiry.

That there was the intention to conceal this policy from the creditors is, I think, pretty clear, but whether for the purpose of preserving it for the benefit of Mr. Pfleger himself, or to give it as a security for the defendant's debt, I am by no means confident. But I am of opinion that if the agreement were established it is altogether void.

It is, I think, perfectly true, that the cases, of which *Cumber v. Wane* is considered to be the leading one, establish this: That it is no consideration for the release of a debt to take a portion of it. But one of the exceptions is the case of composition with creditors. It is an exception for this reason, that if a person makes a composition with his creditors, it is always assumed that each creditor acts upon the belief and assumption that the others will accept exactly the same amount as he takes, and nothing more. If it could be proved that one creditor who takes more had entered into an agreement, not merely with his debtor but with every other creditor, that he should be allowed to do so, then no doubt it would be sufficient. But if any one creditor who has accepted

¹ 13 Ves. 581.

² 3 Anst. 910.

³ 3 Younge & Jer. 212.

⁴ 3 Myl. & Cr. 302.

⁵ 2 Beav. 385.

⁶ 1 Barn. & Ald. 1.

⁷ 2 Term R. 24.

⁸ 10 Adol. & Ellis, 121.

⁹ 5 East, 230.

the composition (I do not speak about executing the composition deed, because I do not think anything turns upon that) has not also agreed that one should take a larger benefit than the rest, then the consideration fails, because the assumed principle upon which the composition proceeds is, that every creditor is to be treated alike in the arrangement.

The cases, I think, are conclusive upon the subject. *Bush v. Shipman*,¹ which was not cited, was to this effect: A having purchased but not paid for a parcel of hops, which remained in the possession of B, the seller, subject to his lien for the purchase money, assigned his effects to the trustees for the benefit of such of his creditors as should signify their assent to the deed and send in an account of their demands within three months from the date of it. A informed B that he had assigned his effects for the benefit of his creditors, and thereupon B wrote to the trustees for an authority to sell the hops, and after some correspondence had passed between them, in the course of which B, as he said, signified his assent to the deed, the trustees gave the authority, and B sold the hops. They produced much less than was due to him, and then B claimed to be paid a dividend under the deed on the balance remaining due to him. It was held that his claim was not sustainable. The vice-chancellor of England in giving judgment said: "It is quite impossible to grant the relief that is asked by this bill, and for two reasons. First, the plaintiffs have not complied with the express terms of the deed, and secondly, what they ask is inconsistent with the spirit and intention of it. The case of *Cullingworth v. Loyd*² governs this case, though to some extent it differs from it. At all events what was said by the judges in *Leicester v. Rose*,³ is decisive of the question. The deed in *Cullingworth v. Lloyd* contained a release not only of the debts due to the creditors who should execute it, but also of all the securities which they might hold for their debts, and in that respect the case differs from the present. But here the plaintiffs wished to secure themselves, as far as they could, by selling the goods upon which they had a lien, and applying the proceeds, as far as they would extend, in satisfaction of their debt, and then to come in upon a footing of equality with the other creditors under the composition deed. It was no doubt the intention of the debtor,

1 14 Sim. 239.

2 2 Beav. 385.

3 4 East, 372.

when he conveyed his property to trustees, that a ratable division of it should be made among all his creditors who should determine, within a certain time, to accept what they might obtain under it in full satisfaction of their debts; and it seems to me to be quite inconsistent with that intention that a creditor, having a security for his debt, shall be allowed, first, to get all he can by means of his security, and then to come in under the deed."

It is exactly the same here, if you reverse the order of the transaction, for he contends that he is first to take all he can under the composition, and then to obtain the benefit of the security. The word "deed" was used there, but in fact it is nothing to the purpose; it is quite sufficient if there be an arrangement or agreement between them; it is not necessary to be in writing or under seal, and the release is as perfect at law as it is in equity. The case which was pressed very strongly upon me is *Thomas v. Courtnay*;¹ but in fact the case of *Thomas v. Courtnay* rather confirms than injures the view I take of this case. I observe also that it was cited in *Bush v. Shipman*, and therefore was present to the mind of the judge in deciding the case. In *Thomas v. Courtnay* the plaintiff agreed to take a composition of 12s. in the pound on a debt of £1,200 due from Messrs. Baker, but for £200, part of it, he held the acceptance of Colonel Gower, who paid it and who had no remedy over against Baker & Co. The court held that the plaintiff after receiving the £200 was entitled to a composition of 12s. in the pound on £1,000, which was really the amount of Baker's debt, and not on £1,200. It is therefore no authority for the case which is now before the court.

The case of *Coleman v. Waller*² is, I think, as strong a case as could well be suggested to the court, because there it was not the debtor nor a creditor, but a mere stranger who guaranteed one of two debts, and yet the court held that the bargain was void as a fraud on the rest of the creditors, and that the arrangement could not be enforced.

Such being the view I take of this case, it is impossible, after this lapse of time, to hold that the defendant is now at liberty to repay the composition and rely upon the security. He accepted the composition in December, 1848, ten years before the death of Pfleger, and he cannot now say that he is entitled to receive the benefit of the security.

¹ 1 Barn. & Ald. 1.

² 3 Younge & Jer. 212.

Trew v. The Railway Passengers' Assurance Company.

In that case I am of opinion that he must account for the whole amount received upon the policy, and the decree must be made as asked by the plaintiffs with costs.

*JULIA TREW et. al. vs. THE RAILWAY PASSENGERS' ASSURANCE COMPANY.*¹

(6 Hurl. & N. 839. Exchequer Chamber, 1861.)

Accident. Drowning.—H. effected with the defendants a policy of assurance, whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown. *Held*, in the exchequer chamber: First, that assuming H. died from drowning, that was death by "accident" within the meaning of the policy. Secondly, that it was a question for the jury whether H. died from the action of the water or from natural causes.

THIS was an appeal against the judgment of the court of exchequer in discharging a rule calling on the defendant to show cause why the nonsuit should not be set aside and a new trial had. The pleadings, policy of assurance, and facts sufficiently appear in the report of the case in the court below.²

The questions for the decision of the court of appeal were: First, whether, assuming the said F. Hiorns to have been drowned at Brighton on the evening of the 15th of September, 1856, and that his death was not caused by suicide, either felonious or otherwise, or by his wilful act in exposing himself to unnecessary danger or peril, or whilst he was in a state of intoxication, the plaintiffs are entitled to recover in this action.

Secondly, whether there was any evidence proper to be submitted to the jury that the said F. Hiorns was so drowned.

If the court should be of opinion in the affirmative on both

¹ This case should have appeared in the previous volume in connection with the judgment there given (p. 588) by the the court of exchequer, but was accidentally omitted.

² *Ante*, vol. 2, p. 588.

Trew v. The Railway Passengers' Assurance Company.

questions, then the nonsuit to be set aside and a new trial had. If the court should be of opinion in the negative on either of the said questions, then the nonsuit to stand.

G. Francis, for the plaintiffs. First, there was evidence that the deceased was drowned whilst bathing. In the court below *Martin, B.*, said: "I am of opinion that the rule ought to be discharged; and I am of that opinion, on the assumption that there was evidence for the jury that the person assured died whilst bathing." *Watson, B.*, was of opinion that, looking at all the circumstances, there was some evidence for the jury that the deceased was drowned. Then, secondly, is drowning an accident within the terms of this policy? The policy provides that, "If at any time during his life, &c., the assured shall sustain any injury caused by accident or violence within the meaning of this policy and the conditions hereto, and if the assured shall die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the company shall be subject and liable to pay the full sum hereby assured to the legal representatives or assigns of the assured," &c.: "Provided, that no claim shall be made under this policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors." Here the assured died from injury resulting from accident, and caused by some outward and visible means. In *Taylor's Medical Jurisprudence*, p. 721, 6th ed., it is said: "No doubt now exists among physiologists that death by drowning is due to *apnoea*, or suffocation, in which condition breathing is arrested, and the blood is at first circulated in a state unfitted to support animal life, and sooner or later its circulation through the minute vessels of the lungs is wholly arrested, thus producing the state of asphyxia." Assuming that the deceased was drowned, his death was not caused by natural disease. [*COCKBURN, C. J.* That would apply to cramp; but suppose he died of apoplexy whilst in the water. — *CROMPTON, J.* If his death was caused by cramp preventing him from swimming, then he died from injury caused by accident; but death by apoplexy is a death from natural disease. The court below evidently considered that the question before them was, whether the deceased died from drowning or apoplexy.] If drowning be held a death from natural disease, all cases of drowning would

be excluded from this policy. This subject was considered in *Sinclair v. The Maritime Passengers' Assurance Company*, 7 Jur. N. S. 367,¹ where Cockburn, C. J., in delivering the judgment of the court, said: "It is difficult to define the term 'Accident' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume that in the term 'Accident,' as so used, some violence, casualty, or *vis major* is necessarily involved." The fact that the deceased died in the water was evidence for the jury that his death was caused by a *vis major*. If he had caught a cold, from which he ultimately died, that would not have been within the terms of this policy. *The Midland Railway Company, app'ts, Bromley, resp.* 17 C. B. 372, was relied upon in the court below; but there Crowder, J., in delivering judgment said: "Where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case."

Lush, (with whom was *Phipson*,) for the defendants. First, death by drowning is not death by "accident" within the terms of this policy. The policy was intended to compensate the assured, either where injury short of death was caused by accident or violence, or where death resulted from such injury. But the injury or death must be caused by some outward and visible means capable of satisfactory proof. It is true that if a person walks into the water and is drowned, that is in one sense a death from accident, because it was uncertain whether the event would occur; but it is no more a death from accident, within the terms of this policy, than a death from sun-stroke. It may be different if a sailor falls overboard and is drowned. This is the case of a person voluntarily going into an element which might or might not cause his death; it is like the case of a person who exposes himself to the influence of a tropical sun. But the policy only protects the assured against injury, or death arising from injury caused by violence. [COCKBURN, C. J. Suppose a man rushed into a house whilst it was on fire to save his child, and was burnt to death; would that be death from "accident" within the meaning of this policy?] Since the act of entering the house was voluntary, the death could not be said to be accidental. In

¹ *Ante*, vol. 2, p. 596.

Trew v. The Railway Passengers' Assurance Company.

the case of *Sinclair v. The Maritime Passengers' Assurance Company*, 7 Jur. N. S. 367, the assurance was against "any personal injury from, or by reason, or in consequence of any accident." Cockburn, C. J., in delivering the judgment of the court, said: "It is true that in one sense disease or death through the direct effect of a known natural cause, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes." Secondly, assuming that death from drowning is within the terms of this policy, there is no evidence that the assured died from drowning. His death may have been caused by apoplexy or cramp in the heart. [COCKBURN, C. J. The probability is greater that he died from drowning than from other causes.] By the terms of this policy it is not enough that probably the assured died from drowning, but the nature of the death must appear. [CROMPTON, J. The same argument would apply to the case of a person who fell overboard from a ship.] There must be evidence from which a jury may reasonably and properly conclude that the assured died from drowning. *Toomey v. The London, Brighton & South Coast Railway Company*, 3 C. B. N. S. 146. He then argued that there was no evidence that the assured was dead.

Francis, in reply. It appears by Taylor's Medical Jurisprudence, p. 725, 6th ed., that where death occurs in the water, it is in very few instances caused by apoplexy. The policy must be construed most strictly against the assurers. The proviso that "No claim shall be made under this policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means, of which satisfactory proof can be furnished to the directors," refers to cases of personal injury, not death; and therefore does not apply to a claim made by the representatives of a deceased person.

COCKBURN, C. J. We are all of opinion that this nonsuit was wrong, and that the judgment of the court of exchequer, in refusing to set it aside, was erroneous. It is said that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. Lush ingeniously argued that the policy only applies to cases where from accident

or violence some injury occurs from which death may or may not ensue ; and if it ensues within three months, the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply ; and whereas, from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed ; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give those policies a construction which will defeat the protection of the assured in a large class of cases. We are therefore of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy.

The next question is, whether there was evidence for the jury that the assured met with his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and, assuming that it was, the question ought to have been submitted to the jury whether he met with his death by drowning. If they found that he died in the water, they might reasonably presume that he died from drowning. It is true, that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart ; but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes. If they are of opinion that he died from the action of the water causing asphyxia, that is a death from external violence within the mean-

Reynolds v. The Accidental Insurance Company.

ing of this policy, — whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth. For these reasons we think that there must be a new trial. *Award of trial de novo.*

REYNOLDS, Executor, vs. THE ACCIDENTAL INSURANCE COMPANY.

(22 Law Times N. S. 820. Common Pleas, 1870.)

Accident. Drowning. — H. effected with the defendant a policy of assurance, whereby it was agreed that if he should receive or suffer bodily injury from any accident or violence, in case such accident or violence should cause his death within three months after the occurrence of such accident or violence, the sum assured should be payable to his personal representatives. The policy contained a proviso, that no claim should be payable under the policy in respect of death or injury by accident or violence, unless such death or injury should be occasioned by some external and material cause operating upon the person of the insured, and unless, in the case of death, such death should take place from such accident or violence within three calendar months from the time of the occurrence of such accident or violence. During the continuance of this policy H. went into the sea to bathe. While in a pool about one foot deep, he became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards. A few minutes afterwards, he was found lying dead with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The immediate cause of his death was suffocation by the water, but the pool being shallow, such suffocation would not have taken place had he not been incapable of helping himself, in consequence of the insensibility above mentioned. *Held*, that H.'s death was caused by accident, within the meaning of the policy.

THIS cause came on to be tried at the sittings after Trinity term, 1869, when a verdict was taken for the plaintiff for £300, subject to the opinion of the court on the following case:—

1. Thomas Humphrey effected with the defendants a policy of insurance, whereby it was declared that if, during the continuance of such policy, the said Thomas Humphrey should receive or suffer bodily injury from any accident or violence, in case such accident or violence should cause the death of the said Thomas Humphrey within three calendar months after the occurrence of such accident or violence, the full sum of £300 should be payable to the personal representatives of the said Thomas Humphrey within one calendar month after proof satisfactory to the directors should have been furnished of the death of the said Thomas Humphrey, in manner entitling them to receive the said sum under or by virtue of such policy.

2. The said policy also contained the following clause:—

Provided also, and it is hereby expressly agreed and declared, that no claim shall be payable by the said company under the policy in respect of death or injury by accident or violence, unless such death or injury shall be occasioned by some external and material cause, operating upon the person of the said insured, and unless in the case of death as aforesaid such death shall take place from such accident or violence within three calendar months from the time of the occurrence of such accident or violence.

3. A copy of the said policy and of the conditions of insurance is annexed, and is to be taken to be a part of this case.

4. During the continuance of the said policy, the said Thomas Humphrey, while on a visit to Hastings, went into the sea to bathe. While in a pool about one foot deep, he became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards.

 Reynolds v. The Accidental Insurance Company.

5. A few minutes afterwards he was found lying dead with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water.

6. The immediate cause of the death of the said Thomas Humphrey was suffocation by the water in which his face was submerged, but the pool being shallow, such suffocation would not have taken place had he not been incapable of helping himself in consequence of the insensibility above mentioned.

7. The plaintiff is the executor of the said Thomas Humphrey.

The question for the opinion of the court is, whether the death of the said Thomas Humphrey occurred in a manner entitling the plaintiff, as his executor, to receive the sum of £300 under or by virtue of the policy. If the court shall be of opinion that it did, then the verdict for the plaintiff is to stand; if the court shall be of opinion that it did not, then the verdict entered is to be set aside, and a verdict entered for the defendants, with costs of suit.

Meadows White, for the plaintiff. If this matter were *res integra*, it might possibly be contended that death from drowning was not a death by "accident" within the meaning of this policy. But it has already been decided to be a death by "accident" in *Trew v. The Railway Passengers' Assurance Company*, 6 H. & N. 839, [*supra*.] The only difference between the policy in that case and the policy in this is, that there the words were "sustain any injury," whereas here they are "sustain any bodily injury."

Bosanquet, (*H. James*, Q. C., with him,) for the defendants. The point really decided in that case was, that, under the special circumstances, there was evidence on which a jury might have found that the death was within the policy, but not that such a death was accidental or violent. If a man is pushed into the water or forcibly held down in it, his death then results from violence within the meaning of this policy. If a man accidentally falls into the water and is drowned, his death results from accident; but if a man falls down in a fit in a shallow pool and is drowned, his death is the result, not of accident or of violence, but of the fit, even though the immediate cause of death be, as here, suffocation by drowning.

WILLES, J. In this case the death resulted from the action of the water on the lungs, and from the consequent interference with respiration. I think that the fact of the deceased falling in the water from sudden insensibility was an accident, and consequently, that our judgment must be for the plaintiff.

KEATING and M. SMITH, JJ., concurred.

Judgment for plaintiff.

Attorneys for plaintiff: *Prior & Bigg*.

Attorneys for defendant: *Chappell & Son*.

JOHNSON vs. SWIRE.

(3 Giff. 194. Coram Stuart, V. C. 1861.)

Title to policy. — Trustees of a settlement of a policy of assurance being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room; but the policy of assurance was not mentioned in the assignment to the new trustees. *Held*, that the new trustees were not entitled to recover the policy as against the creditor.

THE plaintiff in this suit represented the Argus Life Assurance Company, and filed this bill, on behalf of the company, against John Swire, Edward Southam, Edward Starkey, Lewis Langworthy, and Thomas Bridge, praying that they might interplead together.

By an indenture, dated the 2d of January, 1844, one John Southam assigned certain profits and moneys to the defendants John Swire and Edward Southam, upon trust to invest the same at interest in manner therein mentioned, and to accumulate and invest the interest during the life of John Southam; and after his decease to hold the said trust funds and securities in trust for such person or persons as he should by will appoint; and in default thereof, in trust to pay the interest thereof to Mary Southam, his wife, for her life, and after her decease in trust for her children. The deed provided that it should be lawful for the trustees, with the consent of the said John Southam, to apply all or any part of the trust money, or interest in effecting a policy of insurance on the life of the said John Southam, of such sum of money as the trustees, with such consent, should think proper, such policy to be held upon the trusts of the settlement. In pursuance of this authority, Messrs. Swire and Edward Southam, as such trustees, on the 24th of October, 1844, effected a policy of assurance with the Argus Assurance Company on the life of John Southam, for £1,000, at a premium of £25 13s. 4d.

By an indenture dated the 1st of June, 1846, Messrs. Frodsham and Hunter were appointed new trustees of the settlement in the room of Messrs. Swire and Southam; and the policy was assigned by the latter gentlemen to Messrs. Frodsham and Hunter. By an indenture dated the 2d of November, 1847, Messrs. Hudson and William Southam were appointed trustees in the room of Messrs. Frodsham and Hunter, by whom the policy and

moneys secured thereby were assigned to Messrs. Hudson and W. Southam as such trustees.

On the 15th of November, 1851, Messrs. Hudson and W. Southam, with the knowledge of John Southam, assigned the policy to the defendant Starkey, a creditor of John Southam. The defendant Starkey, in his answer, stated the transaction as follows: That the trustees of the indenture of January, 1844, had no moneys in their hands to meet the premium on the policy which fell due on the 25th of October, 1851; that the premium was not paid, and the policy was in fact about to drop. That on the 22d of January, 1848, he had lent the sum of £50 to John Southam at interest; and in November, 1851, upon his (Starkey's) pressing for payment, it was agreed that the policy should be assigned to him in consideration of the debt, and that he should be entitled to receive the policy for his own benefit. The indenture of the 15th of November, 1851, was then prepared and executed, and by it the said policy of assurance, and all sums of money to become due or recoverable by virtue thereof, and all the estate, right, title, and interest of the said Thomas Hudson, William Southam, and John Southam therein were assigned to him, Edward Starkey, his executors, &c., absolutely, together with full power and authority for him, his executors, &c., in the names of John Swire and Edward Southam, or of the said Thomas Frodsham, John Hunter, William Southam, and Thomas Hudson, to receive and give effectual discharge for all sums of money to become due upon the said policy thereby assigned, and to commence such action for the recovery of the money thereby assigned as should be deemed necessary. That after the date of the assignment, he, Starkey, paid the premium which accrued due on the 25th of October, 1851, and received the policy. He had continued to pay premiums to the company from that time up to and including the payment which accrued due on the 25th of October, 1859, and he claimed to be entitled to the proceeds of the policy.

On the 17th of March, 1852, Messrs. Langworthy and Bridge were appointed trustees of the indenture of January, 1844, in the room of Messrs. Hudson and W. Southam; and thereupon all the trust property (except the policy) was assigned to the said new trustees. On the 11th of March, 1860, John Southam died, upon which Mr. Starkey applied to the company's agent at Manches-

ter for payment of the moneys. He also furnished evidence of the death and the assignment of November, 1851. He informed the directors that the other assignments were assignments to the trustees on appointment, and were in the possession of the trustees last appointed. The directors refused to pay the moneys assured without production of the assignments, in order to see that Messrs. Hudson and W. Southam had power to assign the policy to Mr. Starkey.

On the 27th of April, 1860, the company's agent received a letter from the solicitors of the defendants, Messrs. Langworthy and Bridge, stating that they believed the policy of assurance belonged to them, as trustees of the settlement of 1844; and they afterwards sent in an abstract of their title, setting out the deeds of January, 1844, June, 1846, and November, 1847. It appeared by the abstract, that by an indenture dated the 17th of March, 1852, Messrs. Langworthy and Bridge were appointed new trustees of the indenture of 1844, in the place of Thomas Hudson and William Southam, and "all the trust estate and effects vested in the latter as such trustees" were assigned to Messrs. Langworthy and Bridge on the subsisting trusts of the settlement of 1844. On the 7th of September last, Messrs. Langworthy and Bridge commenced an action against the company, in the names of Messrs. Swire and Edward Southam, to recover the proceeds of the policy; and by an order made in the judge's chambers the plaintiff, Mr. Johnson, as resident director, was ordered to represent the company in the action, and he thereupon filed this bill, and obtained an injunction restraining the action.

The defendants Swire and Edward Southam, by their answer, disclaimed any beneficial interest in the money, and were willing to act with reference thereto, and to the action at law, as the court should direct.

Messrs. Langworthy and Bridge, by their answer, alleged that John Southam by his will bequeathed to his son John Southam, an infant, all the property, subject to the trusts of the indenture of January, 1844; and they submitted that, under the circumstances, the policy of assurance became and was subject to the trusts of the will, and that they, as the present trustees, were entitled to recover the moneys and hold the same upon the trusts of the indenture. They further said that the defendant, Edward

Starkey, before he accepted the assignment, had full notice of the indenture of the 2d of January, 1844, and was bound by the trusts thereof; and they had offered to pay to the defendant Starkey £50, with interest from the date of the alleged assignment, together with all premiums which he might have paid in respect of the policy and interest, upon his relinquishing all further claim, which was the most he could get even if he had held a valid mortgage of the policy; but that the defendant had declined the offer.

Mr. *Chapman Barber* appeared for the plaintiff, and asked for the usual order in an interpleader suit.

Mr. *C. Hall* appeared for Messrs. Swire and Southam, in whose name the action had been commenced, and disclaimed all beneficial interest in the policy.

Mr. *Bacon & Mr. Rowcliffe*, for the defendant Starkey, contended that he was a purchaser for value, and his title could not be impeached. At the time he took the assignment, he was a creditor and entitled to be paid his debt. At that time the policy was not worth the amount of the debt, and, had he not consented to take it, it must have dropped, as the trustees had not the means of paying the premiums. After the assignment to him, the defendant Starkey paid all the premiums as they fell due; and, but for the unforeseen death of John Southam, the trustees would never have sought to disturb the transaction. It was submitted, therefore, that the defendant Starkey was entitled to the fund.

Mr. *Malins & Mr. Hamilton Humphreys*, for the defendants, the present trustees, contended that it was their duty to recover the property of the *cestui que trust*. It was clear that the former trustees had improperly parted with the policy to the defendant Starkey, and were responsible for their conduct; but inasmuch as Starkey knew it was trust property, he must, in this court, be taken to know the trusts, and could not now be permitted to set up his arrangement with the former trustees as a bar to the claim by the present trustees. It was said that the policy was of no value, and that the trustees had no funds out of which to pay the premiums; but there was no evidence to show that the then trustees had taken any steps to have the value ascertained, or to have the policy surrendered to the office.

In *Drysdale v. Piggott*,¹ a creditor effected an insurance in

his own name, and paid all the premiums but the first, and the debtor, on being applied to, refused to pay the premiums, which the master of the rolls held defeated his right to the policy, but the lords justices reversed that decision. That was a far stronger case than this.

[The case of *Fortescue v. Barnett*² was referred to.]

The VICE-CHANCELLOR. The present trustees have nothing to do with this question.

This policy was not assigned to them. Their predecessors in the trust assigned to them all the other trust property, but not this policy. The former trustees, in the exercise of their discretion, dealt with this policy by assigning it (upon a transaction which they thought a provident one) to the defendant Starkey, who has got possession of it under that assignment. The trustees who executed that assignment are accountable to the *cestui que trust*, but they are not accountable to the present trustees of the settlement; nor is the defendant Starkey accountable to the present trustees of the settlement for his dealing with the former trustees. The present trustees have no right to interfere or intervene at all, by making a claim which has occasioned this expensive litigation, and which I am bound to decide against them. The only question now is, as to the costs; and I am not disposed to order that the costs of the other defendants be paid by Messrs. Langworthy and Bridge. On the other hand, I am not disposed to order that their costs of the contest which they have raised shall be paid out of the proceeds of the policy, or to say that they will be justified in charging them against the trust estate in their hands.

The order will therefore be, that no costs shall be allowed to the defendants Langworthy and Bridge; and as to the rest, the costs of the plaintiff, including those in the action at law, must be provided for out of the fund. The defendants Swire and Edward Southam being necessary parties, their costs must be taxed and paid out of the proceeds of the policy. The residue must be paid to the defendant Starkey. The injunction must be made perpetual, and the policy delivered up, on payment of the money out of court.

¹ 22 Beav. 238; *ante*, p. 94.

² 3 Myl. & Keen, 36.

HAWKINS vs. COULTHURST.

(5 Best & S. 343. Queen's Bench, 1864.)

Restriction as to travel. Damages.—A deed by which the defendant assigned a policy of insurance on his life for £1,000 to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited. The policy was subject to a condition that if the assured should go beyond the limits of Europe without license from the directors the contract should be void. In an action for a breach of covenant, in that the defendant went beyond the limits of Europe without license from the directors, *held*, that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the defendant covenanted to pay and should pay premiums on the policy.

THE declaration stated that by deed bearing date the 7th May, 1856, after reciting that the defendant had by policy of insurance dated the 20th March, 1856, effected an insurance on his life in the United Kingdom Assurance Society for the sum of £1,000, subject to the annual premium of £20 2s. 6d., and that the defendant was indebted to the several persons named in the schedule thereto in the amounts set opposite to their respective names, and that the defendant had agreed to assign the policy and all moneys secured and receivable thereon to the plaintiffs upon the trusts thereafter contained for securing the payment of the debts with interest, the defendant assigned to the plaintiffs the policy of assurance and the full benefit and advantage thereof and of all and every sum of money that should become due or be recoverable upon or by virtue of it, and all the right, title, interest, property, benefit, claim, and demand whatsoever both at law and in equity of him the defendant in, to, or out of the same. To have, receive, and take the policy, sum and sums of money and premises unto the plaintiffs, their executors, administrators, and assigns. In trust nevertheless as a pledge or security for the payment of the several debts mentioned in the schedule, with interest after the rate of £5 per cent. per annum. The deed contained a covenant that the defendant had not at any time theretofore made, done, executed, or suffered, and should not nor would at any time thereafter make, do, execute, or suffer any act, deed, matter, or thing whatsoever by means whereof the policy of assurance thereby assigned or intended so to be was, could, should, or might be impeached, charged, avoided, forfeited, vacated, or incumbered, or by means whereof the plaintiffs should or might be hindered or prevented from recovering or receiving the sum or sums recoverable or to be recovered thereupon or by virtue there-

of; and that he would during the continuance of the security regularly pay the premiums and do all other things necessary to be done for keeping the policy of insurance on foot, and would in all things conform to the rules of the United Kingdom Assurance Society so far as related to the intent that the same might be preserved in full force; and would, within seven days after the premiums should become due, deliver the receipt for the same to the plaintiffs; and further, that in case he should neglect to pay the annual sum payable in respect of the policy for keeping the same on foot, or to deliver to the plaintiffs the receipt for the premium, it should be lawful for the plaintiffs to advance and pay such annual sum, and he would, on demand, repay such sum to them with interest. Averment: That the policy of insurance was made subject to and under the condition or proviso, amongst others, that is to say, that in case the assured should go beyond the limits of Europe without previous license from the board of directors of the assurance company for that purpose, the policy should be null and void, and all moneys paid by or on behalf of the assured on account of the insurance should be forfeited. Breaches. First and second: That the defendant neglected to pay the annual premiums, or deliver to the plaintiffs, within seven days after the premiums became due, the receipts for the same; and thereupon the plaintiffs, for the purpose of keeping the policy on foot, paid to the United Kingdom Assurance Society such annual sums of money; and although, &c., the defendant had not repaid the same to the plaintiffs. Third: That the defendant went beyond the limits of Europe, to wit, to the colony of Canada East, without previous license from the board of directors of the United Kingdom Assurance Society for that purpose. Whereby and by reason of the premises the policy of assurance became and was vacated, and became and was null and void, and the plaintiffs lost the benefit and security of the policy for the payment of the premiums and sums of money paid and advanced by them, and the policy became wholly lost as a security to the creditors for the payment of their several debts.

First plea: That the deed was not the defendant's deed.

Issue thereon.

On the trial before Shee, J., at the sittings in London after Hilary term, a verdict was entered for the plaintiff for £150 17s. on the first breach, 1s. on the second, and 1s. on the third; with

liberty to the plaintiffs to move to increase the damages on the last breach to £1,000 or such other sum as the court might direct.

In Easter term a rule accordingly was obtained.

H. James showed cause. The proper measure of damages is the present value of the policy, to be ascertained by deducting from the full amount assured the sums which would be estimated as payable by way of premiums, if the policy had not lapsed, according to the average duration of human life.

R. A. Fisher, (*Huddleston* with him,) in support of the rule. The security having been destroyed by the voluntary and wrongful act of the assured, the trustees of the creditors are entitled to the £1,000. [CROMPTON, J. You contend that the trustees are entitled to the £1,000 twenty years, it may be, before it is due. — BLACKBURN, J. Suppose a policy subject to a condition that if the assured die upon the seas it should be void, as in *Dormay v. Borradaile*,¹ and the assured had so died.] If this policy were in force, the trustees might, by the death of the assured, be entitled to the £1,000 immediately; and where the defendant may be regarded in the light of a wrong-doer in breaking his contract, the damages are to be assessed on the highest principle. In *Chitty on Contracts*, p. 793, 7th ed., by Russell, cited in *Mayne on the Law of Damages*, p. 10, it is said that in such cases “a greater latitude is allowed to the jury in assessing the damages;” as in an action on a bond to resign a living. *Lord Sondes v. Fletcher*.² The present is analogous to an action for destroying or detaining title deeds, in which the plaintiff recovers the whole value of the land.³ [CROMPTON, J. In the latter case, large damages are given in order to constrain the defendant to give up the title deeds. — MELLOR, J. The present is more like an action upon the breach of a contract for the purchase of a reversion.]

PER CURIAM. (CROMPTON, BLACKBURN, MELLOR, and SHEE, JJ.) Rule absolute in the following terms:—

“It is ordered that the damages given on the verdict obtained in this cause on the third breach be increased, by the same being assessed on the present value of the policy, taking into considera-

¹ 5 C. B. 389; *ante*, p. 57.

² 5 B. & Ald. 835.

³ See *Robertson v. Dumaresq*, 2 Moore P. C. N. S. 66–95.

Traill v. Baring.

tion the fact that the defendant covenanted to pay and should pay premiums on the policy, and that such damages be assessed by an actuary to be agreed on between the attorneys for both parties," &c.

TRAILL vs. BARING.

(10 Jur. N. S. 87. Coram Stuart, V. C. 1864.)

Reinsurance. Misrepresentation. — Insurance Company A., (having previously granted a policy of reinsurance to Insurance Company B. on the life of L. T. for £3,000,) on the 10th of May, 1861, offered to Insurance Company C. £1,000 of the risk, stating that Insurance Company D. had agreed to undertake £1,000, and that they (Company A.) would retain £1,000. Company C. accepted the proposal, without the usual investigation or inquiries into the age, health, or habits of the insured as a partnership risk. The policy granted by Company C. was dated, and the premium was paid, on the 18th May, 1861. Company A., on the 15th May, 1861, came to a resolution not to, and they did not, in fact, retain any portion of the risk; but this resolution, and the course of action upon it, was not communicated to Company C. In 1862 the insured died of heart disease. *Held*, that the policy granted by Company C. was void, and must be delivered up to be cancelled.

THE plaintiffs, three of the directors of the Reliance Mutual Life Insurance Society, filed this bill against the defendants, the trustees and secretary of the Provident Clerks' Mutual Life Insurance Association, for the purpose of obtaining a declaration that a policy of insurance, dated the 18th May, 1861, was fraudulently obtained by the association, and that it might be set aside, and delivered up to the plaintiffs or to the society to be cancelled; that in the mean time an action which had been commenced by the defendants for the recovery of the sum of £1,000, expressed to be insured by the policy, might be restrained, and that the defendants might pay all the costs of the suit. In 1838, the International Life Insurance Society insured the life of one Lydia Taylor for £14,000. In, or previously to May, 1861, the defendants granted a policy of £3,000 on the same life to the International Office, by way of reinsurance. The bill alleged that on Friday, the 10th of May, 1861, the secretary of the defendants' association called on the secretary of the plaintiffs' society, and informed him that the association had granted the insurance for £3,000, by way of a partial reinsurance of a heavy insurance granted by the International Office on the life of Lydia Taylor; that the Victoria Office had agreed to undertake, by way of re-

insurance with his own office, the risk of the £3,000, to the extent of £1,000; that the association would itself retain £1,000 of the risk, and he proposed that the plaintiffs' society should undertake, by way of reinsurance, the risk of the remaining £1,000. He also stated that Lydia Taylor was alleged to be in the sixty-second year of her age; that the usual medical examination could not be had; but that from information he had obtained, the directors of the association were satisfied that Lydia Taylor was a first-class life, and had accepted the proposal, and granted the insurance for £3,000 upon that footing. This verbal proposal of the secretary of the defendants was entertained, and accepted by the secretary of the plaintiffs, (as alleged,) upon the distinct understanding expressed by the former, that the directors of his association had the fullest confidence in the goodness of the life, and that they would retain £1,000 as their proportion of the risk of the £3,000. The proposal was accepted by the society without the usual investigation or inquiry into the age, health, or habits of Mrs. Taylor, as a partnership risk, in full reliance on the representation by the secretary of the association, that the directors of his office had every confidence in the life of Mrs. Taylor being of the first-class, and that they would retain £1,000 of the risk of the insurance for £3,000. On the 18th May, 1861, the date of the policy, the association paid to the society the sum of £79 13s. 4d. for the first year's premium on the reinsurance. Lydia Taylor died on the 30th January, 1862, of apoplexy, induced as alleged, by disease of the heart; but the plaintiffs' society were not informed of her death by the defendants' association until the 21st May, 1862. Some time after the plaintiffs' society had been informed of the death of Mrs. Taylor, they discovered that on the 15th May, 1861, the directors of the association came to a resolution not to retain any part of the risk, but to reinsure the sum of £1,000, which they had represented they would retain, and accordingly they reinsured the same with the Victoria Office, in addition to the £1,000 already taken by that office; but the plaintiffs' society were never informed, and did not know until long after the death of Mrs. Taylor, that the directors of the association retained no part of the risk of the £3,000. After receiving the letter of the 21st May, 1862, announcing the death of Mrs. Taylor, a correspondence took place between the secretaries of, and the solici-

tors to, the two offices. The result was, that the plaintiffs' society refused to pay the sum of £1,000 which they had insured, and consequently, in October, 1862, an action was commenced upon the policy to recover the amount. The bill (afterwards amended) was filed on the 21st November, 1862, and notice of motion for an injunction was given, but not made, an arrangement being come to that it should stand over to the hearing of the cause. It was proved in evidence that the directors of the Victoria Office had paid the £2,000 insured by them.

The evidence on the part of the defendants showed that the directors of the Victoria Office were willing to take £2,000 of the risk instead of £1,000; that the offer was accepted in consequence of the large amount of reinsurance business done during the week by the defendants' association, and that it was not from any want of confidence in the goodness of Mrs. Taylor's life that the defendants' association did not retain a portion of the risk.

Bacon, Q. C., & *Danney*, were for the plaintiffs. After submitting that the policy was obtained by misrepresentation, and that it had no legal validity whatever, and after referring to the case of *Lincoln v. Wright*, 4 De G. & J. 16, were stopped by the court.

Malins, Q. C., & *Karslake*, for the defendants, contended that the case alleged by the bill had wholly failed. The misrepresentation insisted upon by the plaintiffs was, that the defendants intended to retain a portion of the risk, but which, from accidental circumstances, they afterwards abandoned, was not a material circumstance; but if it were, the plaintiffs ought to have inquired for how long a time the defendants intended to retain the risk. There was no rule that an insurance society should not be allowed to assign these risks. The most that the plaintiffs alleged was, that there had been an untrue statement of an intention; but that was not a sufficient misrepresentation to vitiate this contract. Where an office reinsured, there was no implied contract that they should retain a portion of the risk; or if not, that they should give the new office an opportunity of reconsidering the matter. [They cited *Jorden v. Money*, 5 H. L. C. 185; *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Piggott v. Stratton*, 1 De G., F. & J. 33; *Loffus v. Maw*, 3 Giff. 592; 8 Jur. N. S. 607; *Wilde v. Gibson*, 1 H. L. C. 605; and *Burdett v. Hay*,

9 Jur. N. S. 1260 ; [Sir J. Stuart, V. C., mentioned *Hammersley v. De Biel*, 12 Cl. & Fin. 45.]

Sir J. STUART, V. C. The contract in this case is upon a policy of reinsurance ; and as to that policy the plaintiffs have stated and proved that they entered into and executed it upon a treaty which took place between the secretary of the plaintiffs' insurance society and the secretary of the defendants' association. Being a contract for reinsurance, one of the representations made by the secretary of the defendants' association, as stated by himself in his answer in the 11th paragraph, after referring to a conversation as to the reinsurance for £3,000, is in these terms : " I at the same time told him that the Victoria Office had offered to take £1,000, or more of such £3,000, but that it was the intention of the Provident Clerks' Office to give the Victoria Office £1,000 only of such £3,000, and to keep £1,000. This statement was strictly true in all respects, and the intention of the Provident Clerks' Office was then precisely such as I have represented it to be ;" and then he goes on to state that he believed Mrs. Taylor was aged sixty-two years ; that a fresh medical examination of her could not be had ; and that his directors were satisfied her life was of the first-class. This took place upon Friday, the 10th May, 1861 ; and upon the same day, in an acceptance — made upon that representation — in writing, the plaintiffs' secretary said : " This office will join you in the risk upon the life of Mrs. Lydia Taylor to the extent of £1,000." There is no question of the importance of the representation that was made ; and its importance is stated in the evidence, on behalf of the plaintiffs, of Mr. Jellicoe, president of the Institute of Actuaries, and an actuary of great experience, and who has been examined and cross-examined ; and he says, " Upon such reinsurance it is the custom and understanding (in the absence of a special stipulation or statement to the contrary) that the office effecting the reinsurance shall itself retain a substantial portion of the risk covered by the original insurance, and for the office, by which the reinsurance is granted, to dispense with the usual medical examination on their behalf of the person whose life is insured . . . and to rely on the retention by such office of their fair portion of the risk, as a guarantee of their good faith in effecting the reinsurance, merely as a diminution of their risk on the particular life, and not for the purpose of get-

ting rid of their liability on a life in which they have not confidence." The importance of the representation is, therefore, beyond all question. The offer, and the acceptance upon that representation, took place upon the 10th May, but the policy was not then made; the contract was not completed; nor was any premium paid by the defendants' association until the 18th May, that is, eight days after the representation and the offer were made and accepted. But in the mean time (*viz.*, upon the 15th May) the directors of the association made up their minds not to retain any portion of the risk, and not to have a contract for joining in the risk, but to transfer the risk to somebody else. That they made up their minds to do, and did, and it was upon the 15th May, before the policy was signed, that that change of intention took place. It was not merely a change of intention, but it was effectuated; and they retained no liability whatever, but transferred it to the Victoria Office, and that office took it upon themselves, and had paid the £2,000.

There was, therefore, a representation made, which was material as an inducement to the plaintiffs' society to enter into a contract, and at the time when the contract was perfected, that was no longer a true representation. The change of intention which made that representation no longer true, was either accidental or designed. No matter for what purpose; it was concealed from the plaintiffs' society, who had accepted the offer, and executed the policy in pursuance of such acceptance of the offer, which was, to join in the risk. The policy effected was, however, a joining in no risk whatever with the defendants' association. My opinion is, that upon every principle of the law of contract, and on every consideration of the conduct of the defendants' secretary, however honest it may have been, whether by oversight, or whatever reason, that this policy is vitiated; that I am bound to make a decree that the policy be delivered up to be cancelled; and that the defendants must pay the costs of the suit, including the costs incurred upon the notice of motion for an injunction.

Note. — This decision was affirmed on appeal, and the following opinions were delivered.¹

Sir J. L. KNIGHT BRUCE, L. J. It is in my opinion a just inference, from the evidence before us in this cause, that the society represented by the plaintiffs was induced to agree to grant, did agree to grant, and did grant, the re-

¹ See 10 Jur. N. S. 377 (1864).

Traill v. Baring.

insurance policy in question, dated the 18th May, 1861, on the faith and in consequence of a representation made to them on the part of the insured — the society represented by the defendants — that the defendants' society would retain, and remain subject to the extent of £1,000, to the liability upon the insurance for £3,000, as to £1,000 other part of which the insurance in question was granted.

It may be that, until the 15th May, 1861, the society represented by the defendants continued to intend to abide by that representation, but on the 15th May, 1861, that intention was changed. *The notion of retaining any portion of the liability to the £3,000 was abandoned, and a different course was adopted. If that change of intention, if that abandonment, if that different course, if that intention of not taking it, had been communicated to the society represented by the plaintiffs, as it ought to have been without delay, all might have been well. But no such thing was done, and three days after this uncommunicated change of intention, the insurance was allowed to be completed, and the society represented by the plaintiffs was allowed to pay its money. That money ought not to have been received, that insurance ought not to have been allowed to be completed, without a full and clear communication that the intention represented to exist, of retaining the liability under the £3,000 policy to the extent of £1,000, had been abandoned. In my opinion the representation was not true. I repeat, and I think it proved to have been an inducement, and an important inducement, to accept the insurance in the circumstances in which it was accepted, without more inquiry and more investigation than was then made. It appears to me, I repeat, that the plaintiffs are entitled to assert, and to be believed in asserting, that they would not have acted as they have done if they had known, as they ought to have been informed by the society represented by the defendants, of the real facts, and accordingly I am (of) opinion that the decree is right. The contract, I repeat, was obtained by means of an untrue representation — a representation positively intended to be carried into effect at the time, but abandoned afterwards, and the abandonment not communicated. The decree, therefore, appears to me to be plainly right, subject only to two remarks. One applies only as to costs. I have felt some doubts whether the evidence on the part of the plaintiffs has not been more copious and profuse than it should have been; the other, a very trifling one, considering the amount of premium directed to be paid, viz., whether the interest on the premium should have been at the rate of £5 per cent. or £4 per cent. It involves so small an amount that it probably is hardly worth considering or mentioning.

It has been objected to any decree being made on this bill that the word "fraudulently" has been used in the prayer, and that there has been no proof of fraud. My opinion is, that that circumstance forms no objection at all, and that, in one proper sense, the technical sense of the word "fraudulently," it is in its proper place where it is, and does not in the slightest degree affect prejudicially the plaintiffs' case. It has been said, also, that the objection taken by the plaintiffs to the policy is a mere legal objection, and that this dispute, if not proper exclusively for a court of law, is, at least, as proper for a court of law as for this jurisdiction. My opinion is otherwise. It seems to me that that argument is against the established course of the court — I had well-

Traill v. Baring.

nigh said for centuries; and whether the jurisdiction in such a case as this is exclusively here I will not say, and I give no opinion. Subject only to the very small matters that I have mentioned, the decree seems to me, I repeat, manifestly right.

Sir G. J. TURNER, L. J. I am also of opinion that this decree is right. In disposing of the case I desire, in the first place, to absolve the defendants from any intention of actual fraud. It has not been imputed at the bar, and I think the circumstances of the case entirely exclude that consideration; but that by no means disposes of the case, because there are very many causes in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no actual fraud. The question really here is, whether this case does or does not fall within the range of those cases in which this court holds a transaction to be fraudulent, although it may not be morally so.

Now, the case has been put by the defendants as one of implied contract. That view of the case might possibly — I do not say whether it would or not — be right, if the question depended wholly on the custom of insurance offices. But this case does not, in my view of it, in any way depend upon that question; it depends, in my opinion, entirely upon the representations which were made, and which induced the plaintiffs to accept the burden of the reinsurance in question. The question really is, whether representations having been made that a liability would be retained on the part of the defendants, who had accepted the reinsurance for £3,000 from the International Office — whether, that intention having been changed before the liability attached upon the plaintiffs, there ought not to have been a communication of that change of intention to the plaintiffs before they undertook the liability for the £1,000 in question.

Now, I have no hesitation whatever in stating my opinion to be — it may be right or it may be wrong, but, in my opinion, I take it to be quite clear — that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered, to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered, that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who had made the representation to communicate the alteration of those circumstances; and that this court will not hold the party to whom the representation has been made bound, unless such a communication has been made. Now, I will put a case to illustrate what I mean upon that subject. Suppose a man agrees to execute a deed — for instance, to release a debt — on terms agreed upon, on the assurance that another person has agreed to do so, and the other person has, in fact, agreed to do so, but has afterwards withdrawn, but the withdrawal is not communicated to the person who has agreed to give the release, and he executes the deed, I cannot imagine that this court would say he could be bound by the deed he has executed; and if I am not mistaken, there are cases in this court which have gone to that full length. I could refer to a case (*Underhill v. Horwood*, 10 Ves. 225) of a bond given under such circumstances; but, independently of cases, I adhere entirely

Traill v. Baring.

and literally to the opinion expressed by Lord Cranworth in the case of *Reynell v. Sprye*, (*ubi sup.*),¹ and I think that that opinion is perfectly decisive upon a question of this description.

Now, it was said here that the change of circumstances was not such as could in any way have changed the course of the plaintiffs' conduct, and the evidence of witnesses has been relied on in support of that view. But the real question is, not what the witnesses thought, not whether Mr. Ratray thought that those were circumstances which were so material, as that they might change the intention of the plaintiffs, but what the plaintiffs themselves would have thought if the change of intention on the part of the defendants had been communicated to them, the plaintiffs. Therefore, all that argument is entirely beside the question. Had this representation of what had occurred, and of the change of intention on the part of the defendants, been communicated to the plaintiffs, it is impossible to say what course the plaintiffs would have pursued — whether they would or would not have accepted the policy; possibly they might, but it is equally clear that they might not, and we cannot say whether they would or would not, but it was to them that the communication should have been made in order that they might exercise their option upon the subject.

Some observations have been made upon the case of *Gibson v. D'Este*, (2 Y. & C. C. C. 542,) and other cases of that description. I do not think that those cases have any bearing whatever upon the question, because, according to my opinion, no doubt, if a bill alleges a case of fraud, and the plaintiff rests his case upon that case of fraud, the bill must be dismissed; but if the plaintiff puts a case not resting entirely upon the proof of fraud, and proves the case which he has so alleged, he is entitled to relief. The case of *Wilde v. Gibson*, (1 H. L. C. 605; 12 Jur. 527,) and other cases of that description, have no bearing whatever upon the question which the court has to decide. Notwithstanding what was said in *Wilde v. Gibson*, and in order to prevent any misunderstanding upon that subject, it is very clearly explained, I think, by the house of lords in the case of *Archbold v. The Commissioners of Charitable Donations*, (2 H. L. C. 440.) Questions have also been raised upon the jurisdiction which, in my opinion, run into the original question of whether there is an equitable case stated by the bill. If there be an equitable case stated by the bill, there can be no doubt that there is a jurisdiction in this court to interfere by way of injunction, if necessary, and also by way of ordering the instrument to be delivered up to be cancelled; and being of opinion that a case of equitable jurisdiction is proved, and well proved, by the evidence in this case, my opinion entirely agrees with that of the lord justice, and that this appeal must be dismissed, the decree being perfectly right.

¹ 1 De G., Mac. & G. 708; 15 Jur. 1046.

GATAYES vs. FLATHER.

(34 Beav. 387. Coram Romilly, M. R. 1865.)

Premium. Incumbrance.—The defendant agreed to assign a life policy to the plaintiff. When the policy was effected, it was agreed that the payment of one third of the annual premiums should be deferred until the death of the person insured, and be a charge on the policy. *Held*, that this was an incumbrance on the policy which the defendant was bound to discharge.

IN 1862, the plaintiffs filed their bill against the defendant Flather, in respect of some trust matters, but the suit was stayed by a compromise. One of the terms was that Flather should pay the plaintiffs a sum of money, and another was that he should assign to the plaintiffs some policies, one of which was on the life of T. W. Parkes for the sum of £800. This policy was dated in 1851, and it appeared that at the time it was effected it had been agreed between the office and Flather, that the payment of one third of the annual premiums should be deferred until the death of Parkes, and that the amount, with compound interest, should be a charge on the sum assured by the policy. This stipulation was indorsed on the policy. The consequence was, that the charge on this policy now amounted to £151, while its value was only £146.

This suit was instituted for the specific performance of the agreement for compromise, and the plaintiffs thereby insisted that the defendant was bound to assign the policies free from incumbrances.

Mr. *Baggallay* & Mr. *Cracknall*, for the plaintiffs, argued that the defendant was bound specifically to perform the contract, and to discharge every existing incumbrance on the policies beyond the annual premiums. That this was an ordinary matter of conveyance, and not of title.

Mr. *Selwyn* & Mr. *Langworthy*, for Flather, insisted that he had intended merely to assign the policies as they existed, and subject to the terms on which they had been effected. That the rule of this court was, that a party was not bound specifically to perform a contract entered into by mistake, or to perform it with a compensation in a case like the present. *Wood v. Marjoribanks*.¹

Mr. *Cracknall*, in reply.

THE MASTER OF THE ROLLS. I think the plaintiffs are entitled to a decree. It is true that a mistake of fact will justify

¹ 3 De G. & J. 329.

Windus v. Tredegar.

a person in saying that he ought not to be compelled to specifically perform a contract, as where he has mistaken the subject of the thing sold. But here there was no mistake of fact; it was one of law, if one at all. If a man sells a real estate, he undertakes to convey it to the purchaser free from all incumbrances, and he must discharge them all. So if he sells a leasehold estate, it must be assigned free from all incumbrances, except, of course, those which are necessarily incidental to a leasehold, such as the ground rent and the like. I do not know any distinction between the case of the sale of a policy of assurance and the sale of an estate.

The case cited does not appear to me to bear upon the present case. There a person had bought an advowson; he afterwards found that it was incumbered with a charge for money borrowed of the Commissioners of Queen Anne's Bounty for rebuilding the parsonage. Upon this, the purchaser did not ask to be discharged from the contract altogether, which I apprehend he might have done, but he asked to have it specifically performed, with an abatement. The answer to that was: "If you do not like to take it you need not; but you cannot have it specifically performed with an abatement, and we cannot pay off the charge, because it is to be paid off by the incumbent for the time being by annual repayments." That is quite distinct from this case, where there is a charge upon the policy known by the vendor, and which he has the power of discharging.

I am of opinion that the plaintiffs are entitled to a decree for specific performance, and to have the policies assigned to them free from incumbrances. It is quite clear that if that were not so, the parties would not be bound by the agreement, and would be remitted to their rights in the former suit.

WINDUS vs. LORD TREDEGAR.

(15 Law T. N. S. 108. House of Lords, 1866.)

Omission to pay premiums. Bonuses.—W. insured his life in 1812, and paid the premium till 1816, when, owing to removing to another house, he omitted to pay it. But in 1817 he got a new policy for the same amount at the same premium as his policy of 1812, and this premium was duly paid till 1854, when W. died. Certain bonuses attached to policies of 1812. W.'s executor now filed a bill praying that the company be ordered to pay all bonuses, as if the policy had been dated and continued since 1812; but no direct evidence was given beyond the above facts, and W. had made no similar application till 1839. *Held*, (affirming the decree of the M. R. and L. JJ.,) that the bill showed no

Windus v. Tredegar.

right to any equity against the insurance company, for there was nothing to show that the policy of 1812 had not been forfeited.

THIS was an appeal from a decree of the L. JJ., affirming a decree of the M. R.

Thomas Windus, in 1812, effected a policy of insurance on his life for £5,000. He paid the premium in 1813, 1814, and 1815, but omitted to do so in 1816, either within the thirty days or three months allowed by the by-laws. It was alleged that he had removed to another house, and did not receive the usual notice.

In 1817 he obtained a new policy for the same amount at the same premium, and regularly paid the same till 1854, when he died.

It appeared that policies effected in 1812 were entitled to certain bonuses, and it became important for the insured to establish that the policy of 1817 was not a new, but a continuation of the old policy.

In 1839 the insured applied to the directors on the subject to have his policy put on the footing of one effected in 1812, but did not succeed. He died in 1854.

His executors now filed a bill praying that they might be put in the same situation as if the policy of 1812 had been continued. The evidence produced was weak, and it is sufficiently noticed in the judgment.

The M. R., and afterwards the lords justices, dismissed the bill with costs, whereon the plaintiff appealed to the house of lords.

Malins, Q. C., Collins, Q. C., & J. T. Humphrey, for the app., contended that the policy of 1817 must have been a continuation of that of 1812, for as the same premium only was paid, it would otherwise have been incompetent for the directors to grant it, and would have been a fraud on the shareholders. The evidence corroborated the same view.

The *Attorney General* (Palmer) & *Dickinson*, for the resps., were not called upon.

The LORD CHANCELLOR. My lords, I think your lordships will agree with me that in this case it is wholly unnecessary to hear any argument on the part of the resps., and I can only express my regret that the app. should have pursued a losing suit so far, and that he should have persevered in continuing what has been not only an expensive but a hopeless litigation. I must also say that I am surprised that the app., a member of the legal

profession — a solicitor — does not seem to have entertained the least notion that a case utterly devoid of evidence must have been hopeless from the beginning, and that he should have continued to entertain the opinion that he would ultimately succeed, after two previous decisions had been pronounced against him. He has chosen to bring the case before your lordships, and we must dispose of it. His counsel have most undoubtedly put forward his view in a very persevering and energetic manner, and he has no reason to complain that his own view of the case has not been fully brought before your lordships. The circumstances under which the suit was instituted may be very briefly stated. The Equitable Mutual Insurance Society was established in pursuance of a deed of settlement in the year 1762. That deed is a long one, but there is only one part of it which it is necessary to notice, and that is the 67th clause of the deed providing for the case of the revival of policies which may have been forfeited by non-payment of the premium. That clause is in these terms: “That if any premium of assurance shall be unpaid by the space of thirty days after the time stipulated in the policy for the payment thereof, then such policy shall be void, and such default of payment shall be a forfeiture of all claim upon the said society by the person assured by the said policy, his executors, administrators, or assigns; but if the persons who shall have made such default of payment shall within three calendar months after the said day of payment (the persons whose life was by the said policy assured being then in good health) pay or cause to be paid to the said society the said premium so behind, together with the additional sum of 10s. upon every £100 assured, then such policy shall revive, continue in force, and be valid to all intents and purposes whatsoever.” Mr. Thomas Windus, the father of the app., in the year 1812 effected an insurance with the society for the sum of £5,000 for the term of his life at a premium of £146 1s. He paid the annual premiums in the years 1813, 1814, and 1815, but he omitted to pay the premium which became due on the 3d Sept. 1816, and he omitted to pay this premium during the thirty days of grace, which are permitted under the 67th clause of the deed. The consequence was, that the policy became forfeited, and could only be revived by compliance with the conditions of the 67th clause of the deed. I should mention that there is no evidence whatever of any application having been made by him

Windus v. Tredegar.

under the 67th clause. The only evidence that we have is, that on the 9th Jan. 1817, a new policy was granted to him for the same amount at the same premium which he paid under the policy of 1812, that being an original policy granted to him in the ordinary way upon an application made by him upon a declaration and upon references in the ordinary manner. About three weeks, or very nearly three weeks before, on the 19th Dec. 1816, a new by-law was made, which undoubtedly materially affected Mr. Windus's interests. That by-law was in these terms: "That in case any prospective addition shall hereafter be ordered to be made to the claims upon policies of assurance in this society, such order shall not take effect with respect to any policy granted after the 31st Dec. 1816, until the assurance existing in the society prior in number and date to such policy, and if of the same date, prior in the number thereof, shall be reduced to £5,000, but as soon as such reduction shall have been ascertained in manner hereinafter mentioned, the said policy shall be within the effect and operation of the order for such addition as to the payments made thereon subsequent to such ascertained reductions; so that if such order should be made to take effect generally from the 1st Jan. 1820, for the space of ten years then next following, a policy effected in the year 1817 shall not be within the operation of such order until the assurances existing prior to the number and date of the policy as aforesaid shall have been reduced to £5,000; but such policy shall be within the operation thereof from the time when the reduction shall have been ascertained in manner hereinafter mentioned as to the payments made thereon as aforesaid." It is stated on behalf of the app. that Mr. Thomas Windus was in utter ignorance of this by-law. The fact undoubtedly is, that he continued to pay the premium on his policy of 1817 for twenty-two years afterwards down to the year 1839. In the year 1832 Mr. Thomas Windus came within the class of the first £5,000, and therefore became entitled to the benefit of the bonuses of the society according to the by-laws from that year 1832. But still it is said he was ignorant of the prejudicial effect of that by-law upon his interests, and he made no application to the society upon the subject until the year 1839. Now in the year 1839 he presented a memorial to the society, praying either that his policy of 1812 might be revived, or that he might have the same benefit under his policy of 1817 as if it

had been a policy granted in the year 1816. That memorial was by the general court referred to the court of directors, and they passed this resolution: "The court see no reason to alter the arrangement made with Mr. Windus twenty-two years ago, by which the court allowed him to open the present policy at the same premium as he paid on the forfeited policy." It appears that there were other applications made to endeavor to induce the society to rescind that resolution, but without success, and Mr. Thomas Windus continued afterwards for fifteen years down to the time of his death in 1854, to pay the same premiums under the policy of 1817. Upon his death, Mr. Windus, the app., and his executors, received from the society the sum of £8,300, being £5,000 the sum insured, and bonuses to the extent of £3,300 upon the premiums paid from the year 1832 under the by-law of the 19th Dec. 1816. Whether there was any remonstrance or not on the part of the app. does not appear, but the next thing we hear of is, that in the year 1860 he filed a bill in chancery, and in the prayer of that bill prayed that it might be declared that the app. and his co-executors ought to be restored to and placed in the same situation as if the said policy of the 3d Sept. 1812, had been revived and had continued in force until after the death of the said Thomas Windus, or as if the said policy of the 9th Jan. 1817 had been dated as on the 3d Sept. 1812, and to be entitled to all past additions, dividends, bonuses, profits, and allowances accordingly. The case was heard by the M. R., and his lordship dismissed the bill without costs, because no costs were asked for by the society. Mr. Windus presented a petition of appeal and rehearing to the lords justices. That was attended with the same result; the appeal was dismissed without costs, upon the same ground, that the society did not press for them. Then Mr. Windus, not at all disheartened by these two defeats, comes before your lordships with his appeal. Now the case Mr. Windus has always proposed to himself to make out, and which he has endeavored to make out, has been this: that the non-payment of his premium in the year 1816 was entirely owing to an accident; that he had removed his residence at that time, and that the notice of the falling due of the premium which he would have received if he had remained in his former residence never reached him, and that therefore on that ground he forgot and omitted to pay the premium. He then says that he applied to

the society — Mr. Thomas Morgan, I think, being the actuary — within the three months. Having allowed the thirty days of grace to expire, he applied to Mr. Thomas Morgan within the three months, which, under the 67th clause of the deed, is the time limited for persons who have forfeited their policies and who desire to revive them. But he states that at that time Mr. Morgan's mind was occupied with a scheme for the reconstruction of the society; that he entirely forgot the effect of the 67th clause of the deed; that he desired him to delay his application, and assured him that the delay should not prejudice him. In addition to that, he states that he was told by Sir John Sylvester, who was then the vice-president of the society, that he should have a policy granted to him dated in the year 1816. Now, this is the case upon which Mr. Windus grounded his equity for relief. But of this statement there is not a particle of proof to establish the case. The only circumstance laid hold of on the part of the app., which looks like anything that can bear upon the question, is with regard to the policy of 1817 being granted at the premium which was payable upon the former policy of 1812; and the reasoning upon that point is this: it is said that under the deed of settlement the directors had no power to grant a policy in 1817 at a premium which was applicable to the age of Mr. Windus at the time when he had the first policy granted to him in 1812, and that therefore this act of the directors being *ultra vires*, it must be assumed that they were doing that, or intended to do that, which was within their power, and the only thing which was within their power was to revive the policy of 1812, and that therefore the app. is entitled to have the policy of 1812 revived in his favor. Now, with regard to the argument as to the policy being granted at a premium which the directors had no power to grant; that argument may be applied also to what the app. insists they ought to have done, because, if there was no application made within the three months, and if there was no proof given that the party was in good health, and if there was no payment of the premium and fine, or a tender or offer to pay, which would have been sufficient, the directors would have had no power whatever to revive the policy of 1812. Then with regard to the assertion that there was an application made within the three months to Mr. Morgan, the argument which the app. uses is rather extraordinary. He says that under the 35th clause of

the deed of settlement, the actuary is bound to enter upon the books all the transactions relating to the society ; that the books have been searched, and there is no entry of any application having been made by Mr. Windus within the three months. Then he asserts roundly that there was such an application made, and then, taking that absence of proof for proof of an assumed fact, he says, "It is perfectly clear that the application must have been made within that period." There really is, as I have said, not only no evidence in favor of the statement upon which alone the application for relief is based, but the evidence is all the other way. I take, in the first place, the policy of 1817. It is asserted by Mr. Windus that Sir John Sylvester had promised a policy of the date of 1816. It cannot be assumed in favor of the app. that Mr. Thomas Windus was ignorant of the by-law which was passed a few days, or rather a little less than three weeks before ; or that he did not look at his policy and see the date of it ; and it is a most remarkable thing, if he had had that promise from Sir John Sylvester, that he did not immediately remonstrate and have the policy rectified according to the promised date. But he goes on paying the premiums for twenty-two years afterwards, and no endeavor is made by Mr. Thomas Windus to set himself right, according to the views which the app. supposes he must have taken of his own case, until the year 1839. Then in addition to that, after the memorial of Mr. Windus has been rejected, he goes on for fifteen years longer paying the premiums without any further remonstrance or attempt to obtain what is now considered to have been injustice done to him. Then, after the death of Mr. Thomas Windus, his executors receive the sum of £8,300 in the manner I have mentioned ; and, even supposing that the policy of 1817 was void in consequence of the amount of the premium being an improper amount, yet, after the receipt of £8,300 without objection, it is quite impossible that it can be open to Mr. Windus to say that that policy is a void policy. Under these circumstances it appears to me, and I suggest to your lordships, that there really is no evidence whatever to support the app.'s case, and that therefore the decree ought to be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH. My lords, I may say with perfect sincerity that it has never occurred to me in the course of my judicial career to meet with a case depending on the proof of facts

where there has been from beginning to end such a total absence of anything to support the case of the app. as in the present instance. My noble and learned friend has gone through all the facts; I shall not therefore weary your lordships by advert- ing to them again. I will very shortly point out the only ray of evidence that there was, if it could be called evidence, in support of the app.'s view, and that wholly fails. It is this: the only fact established is that on the 9th Jan. 1817, a new policy was granted to Mr. Windus at the old premium, and the argument, which I will put in the most favorable way for the app., is this: that to grant a policy to a man of thirty-eight at the premium which attached to a life of thirty-four, was an act which could not, under ordinary circumstances, be justified, being *ultra vires* of the directors, and that one must therefore look to some extrinsic circumstances to show why it was that such a course was taken; and they say that the only ground must have been this: that Mr. Windus had so dealt with the society that they were bound to grant him a new policy at the old premium, and in so doing they were only discharging their duty. Now, by non-pay- ment of the policy within thirty days of the 3d Sept. 1816, the policy had become void, subject, however, to this proviso, that if Mr. Windus should within three months pay or cause to be paid to the society the premium so behind, together with the additional sum of 10s. upon every £100 assured, then the policy should re- vive, continue in force, and be valid to all intents and purposes. There was a policy granted to Mr. Windus at the old premium, and therefore it is said it must be presumed he did within three months apply to the society, and not only that — because apply- ing to the society merely would be nothing — but that he did apply and pay 10s. per cent., and comply with the other condi- tions, to which I need not now advert, or what probably would be the same thing, tender and offer to pay the money, but it was not received. Now that argument wholly fails; because, even sup- posing all that took place, what the directors did on the 9th Jan. 1817, was just as much *ultra vires* as if no such transaction had taken place. Therefore the argument *omnia presumuntur recte esse acta* will not apply here at all, because, if they had been bound by what had taken place within three months to renew the policy, what they should have done would have been to have renewed the policy in whatever was the proper form, taking 10s.

per cent. by way of fine. Instead of that, when we look at the policy granted, and the entry made concurrently with it, we find that what they did receive was not the 10s. per cent. fine, but 5s. upon every £100 for the entry, which was exactly what they were bound to take supposing this to be a new policy. For by the 67th of the original by-laws, to which our attention has been called, there was to be paid, in addition to everything else, a sum of 15s. for every £100 assured in the name of entry money, and by the repeal or alteration of that by-law in 1770, that 15s. was reduced to 5s. for every £100. What was paid, therefore, by Mr. Windus, was exactly the sum that was required to be paid by the way of entrance fee on a new policy. Therefore, what the directors did was as much *ultra vires* on the assumption of the app.'s case itself, as if it was what it evidently was — an entirely new grant of a new policy at the old premium. Why it was that they granted it at the old premium, we cannot now, after a lapse of thirty years, ascertain. Probably it was that they thought there was some hardship upon him. Whether or not they were justified in what they did is not a matter which your lordships have to determine. It is, I think, perfectly clear that what they did was not a renewal of the old policy, but the granting of a new one, to the full benefit of which, according to all its terms, Mr. Windus is perfectly entitled.

LORD WESTBURY. My lords, I have seldom met with a case to which I have listened with more pain than I have to the present, for nothing certainly can be more distressing than to see a party bent upon pursuing a course of hopeless litigation, which could end in nothing but in augmenting the sorrow and the supposed loss which he already believes himself to have endured. This case was utterly hopeless, whether you regard it upon the grounds taken by the app. himself, or whether you regard it with reference merely to the lapse of time. The story told by the app. is utterly inconsistent with the actual facts that occurred. That the old contract was intended to be renewed is negatived by every single fact that is established with regard to the new contract embodied in the policy of the 9th Jan. 1817. It has been an unfortunate thing for the app. that the directors granted to him that amount of indulgence which appears to have been conceded, by the fact of the old premium being included in the new policy. This has been the foundation of this delusion, for I

White v. British Empire Mutual Life Assurance Company.

can call it nothing else, under which the father labored, and which he appears to have transmitted to his son, the present app. It is a painful thing to deal with litigation which has been carried on under such a delusion, but we can only deal with it in one way, namely, in such a way as to protect the resp.'s from the consequences, and I entirely concur with my noble and learned friends in the conclusion at which they have arrived, that this appeal must be dismissed with costs.

Decree affirmed with costs.

App. in person.

Resp.'s solicitors: *Bray, Warren, Harding & Warren.*

WHITE vs. BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

(Law R. 7 Eq. 394. Coram Malins, V. C. 1868.)

Suicide. Mortgage of policy. — An assurance company advanced money to W. on a mortgage of real security, and on his effecting a policy on his life in their office for the amount of the loan, which was deposited with the company as collateral security. The policy contained a condition that if the assured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any *bonâ fide* interest therein which at the time of such death should be vested in any other person or persons for a sufficient pecuniary or other consideration. W. committed suicide under temporary insanity while the policy was in the hands of the company. *Held*, that the company and the assured stood in the same position as if the policy had been mortgaged to any third person; that the company came within the exception in the condition; and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured.

IN November, 1862, *Horatio White*, being desirous of obtaining the loan of £1,000, applied to the defendant assurance company to advance him that amount. This the assurance company agreed to do on his effecting an insurance in their office on his life, or upon his attaining the age of sixty years, for £1,000, securing the same £1,000 by a mortgage of real security, and depositing with the company the policy for £1,000 so effected in their office by way of equitable mortgage, which was accordingly done.

The policy of assurance was in the ordinary form, and was granted subject to certain conditions indorsed thereon, the one on which the present question arose being as follows: —

“Should any person assured, separately or jointly, die by his

or her own hands, by the hands of justice, or by duelling, before the policy shall have been in existence three years, the policy in every such case shall become void, except to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit, for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation, existence, and extent of such interest: Provided, that notice of such assignment shall have been received by the company at least one month previous to the death of the assured."

Horatio White, in May, 1864, paid off £300, part of the mortgage debt, leaving £700 due to the company, and in June, 1865, (being within three years from the date of the policy,) committed suicide by shooting himself during a period of temporary insanity, that fact having been so found by coroner's inquest.

The company having claimed that the policy was void under the condition by reason of such suicide, and that they were entitled to hold the real estate so mortgaged for the amount due on the mortgage, the widow of the assured, who was also his administratrix with his will annexed, instituted this suit for a declaration that the company were bound to retain in their hands so much of the money secured by the policy of assurance as would be sufficient to satisfy the mortgage debt, and to reconvey to the plaintiffs the real estate freed from the mortgage.

It was admitted that the real estate mortgaged would alone have been an amply sufficient security for the amount of the mortgage debt.

Mr. Cole, Q. C., & Mr. Hallett, for the plaintiff. The assurance company comes within the exception in the 7th condition, of other persons having a *bonâ fide* interest for value in the policy, and the company stands in the same position as any third person would have done to whom the policy had been mortgaged. *Solicitors' and General Life Assurance Company v. Lamb*,¹ *Dufaur v. Professional Life Assurance Company*,² *Jones v. Consolidated Investment Assurance Company*.³

[The point was also raised whether the suicide, being during temporary insanity, was within the condition, but it was not pressed.]

¹ H. & M. 716; 2 De Gex, J. & S. 251.

² 25 Beav. 599.

³ 26 Beav. 256.

White v. British Empire Mutual Life Assurance Company.

Mr. *Glassey*, Q. C., & Mr. *Miller*, for the defendants. The assurance office required the policy, not as a security, but to increase the business and profits of the company. The condition upon which the present question arises was to prevent a fraud upon the company; and although the deposit with the company amounted to a mortgage, it was as a collateral and not as a primary security. The condition was for the protection of the company, and cases might arise where a man about to join in a conspiracy or engage in a duel would insure his life, and it could not be contended that he could by such means save his property. The exception is merely in favor of third persons, and the policy was not intended to repay the money, but merely as a means of extra profit to the company, which would otherwise have charged a higher rate of interest; and, in point of fact, the realty mortgaged being an ample security, the company did not hold the policy within the condition for a valuable consideration.

By the act of suicide the company is defrauded, in so far that thereby the period for payment of the sum assured is accelerated. *Clift v. Schwabe*.¹

In *Solicitors and General Life Assurance Company v. Lamb*,² the question was one between third parties, and not, as in the present case, between the parties to the contract.

Sir R. MALINS, V. C. It is agreed on both sides, that in the events which have happened, if Mr. White had retained the policy in his own hands, it would have been void; and that if it had been deposited for value in the hands of any third person, it would have been valid to the extent of any *bonâ fide* interest in such third person; and the question is, whether the assurance company, having advanced money to the assured, and taken a deposit of the policy as a collateral security, the company must be considered as other persons who have acquired an interest in the policy?

In the case of *Solicitors and General Life Assurance Company v. Lamb*, there was a clause very similar to the one upon which the question arises in this case, and the question as to the nature and effect of such a clause was raised both before Vice-Chancellor Wood and the lords justices; and Vice-Chancellor Wood laid down the rule, which I think is the true rule, that such a condition is

¹ 3 C. B. 437.

² 2 De Gex, J. & S. 251; S. C. 1 H. & M. 716.

for the benefit, not of the office, but of the assured. The vice-chancellor said: "The object of the condition is, to increase the value of the policy to the holder: *i. e.*, in the first place, to the assured. And if that be so, I do not see how I can hold, that in the absence of fraud the estate of the assured is to be deprived of the benefit intended to be given to him by the exception, merely because the mortgagee happens to be fully secured." The same rule was adopted by the lords justices, who held that the condition was intended for the benefit of the assured, in order to render the policy an available security.

This condition, then, being for the benefit of the assured, and it being admitted that if he had deposited it for value with an indifferent person it would have been valid to the amount of such interest, why should the assured be in a less favorable position because the assurance company have themselves advanced him money, and taken it as a security? If the company desired that under these circumstances the assured should be in a less favorable position than if he had borrowed from a third person, they might have stipulated that the proviso should have no operation while they were mortgagees of the policy. I have heard no reason suggested why the assured should stand in a less favorable position than if he had borrowed from an indifferent person.

But the company made no such provision, and I am of opinion that the assurance company contracted in such manner as to place them and the assured in the position of mortgagor and mortgagees; that the condition and the exception contained in it were in force when the assured died, and that the moment they agreed to take the deposit they came within the condition that the policy, to the extent of their interest, should be binding.

The policy, therefore, being still in force to the amount of the debt due to the assurance company, that debt must be considered as satisfied, and the securities held by the company must be reassigned. The assurance company must pay the costs of the suit.

Solicitor for the plaintiff: *Mr. Heathfield Young.*

Solicitors for the defendants: *Messrs. Watson & Sons.*

BRUCE *vs.* GARDEN.

(Law R. 5 Ch. 32. Coram Hatherley, L. C. 1869.)

Insurance by creditor on debtor's life. — An army agent, to whom an officer was largely indebted on the balance of account, effected in his own name policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shown to him, or that he knew that he was in the account charged with the premiums. *Held*, (reversing the decree of James, V. C.,) that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives.

THE plaintiff in this case was the administrator of Major Bruce, and claimed the balance of a sum of money received by the defendant under policies of assurance on the life of Major Bruce. The defendant was an army agent, and had from time to time made advances of money to Major Bruce, and supplied him with goods, receiving his half-pay and other moneys of his. The real balance of the account was always against Major Bruce, but the defendant from time to time drew bills on Major Bruce for round sums, and credited him with the amounts, which at times made an apparent balance in his favor. The bills were, however, always returned dishonored, and the amounts then appeared on the other side of the account. The defendant effected in his own name at different times, six policies on the life of Major Bruce, and paid the premiums on them, charging him with the amounts in the books kept by the defendant, and including them in the sums which contributed to form the balances, and charging interest on them. Major Bruce had attended at the insurance office when the policies were effected, but there was no evidence that he was aware that the amounts of the premiums were charged against him, or that any copy of the account had been sent to him. No letters from the defendant to Major Bruce were produced, but a large number from him to the defendant were in the possession of the defendant, all asking earnestly for advances of money; and in one letter, of the 19th of March, 1861, Major Bruce requested that his account might be charged with interest at the rate of 10 per cent. in order to compensate the defendant.

Major Bruce died in June, 1861, and the defendant afterwards received the money due on the policies, amounting to £3,150.

According to the books of the defendant the balance due from Major Bruce at the time of his death was £1,874 10s. 8d., and in the books an entry was made on the credit side of the account, "1861, Dec. 31. By R. S. Garden. £1,874 10s. 8d.," which the plaintiff alleged to refer to part of money received under the policies; but the defendant, by his answer, said that he wrote off that sum as a bad debt, and denied that it formed any part of the money received under the policies.

Under these circumstances the plaintiff claimed the balance of the money received under the policies.

The cause came on for hearing before the Vice-Chancellor James, who made a decree against the defendant for an account, as reported,¹ where the facts are more fully stated.

The defendant appealed.

Mr. Wilcox, Q. C., & Mr. L. Field, for the appellant. There is no allegation or evidence of any communication having been made to Major Bruce as to these premiums. Major Bruce was, no doubt, aware that his life was insured by the defendant, but must have thought that the defendant effected the policies for his own security, as he had no other chance of being repaid. *Primâ facie*, a policy belongs to the person in whose name it is effected, and the onus is on those who claim it against him to make out their case, and here they have made out none. The account was never seen or known of by Major Bruce, and he was in no way bound to allow the premiums if he had lived, and had not chosen to do so. The account was only kept by the defendant for his private information, in order to show him how he stood with respect to his advances to Major Bruce. As to the bills, they were all for round sums, and were merely drawn in order to raise money on them, and had nothing to do with the balances. The cases of *Freme v. Brade*,² *Triston v. Hardey*,³ and *Morland v. Isaac*,⁴ were not so clear as this.

Mr. Amphlett, Q. C., & Mr. Horton Smith, for the plaintiff. The defendant's books show that the policies were kept on foot by the money of Major Bruce, and that is enough. The account was not merely a private account, for the defendant was bound, as agent, to keep a proper account, and did so. Can any one

¹ Law Rep. 8 Eq. 430.

² *Ante*, p. 182.

³ 14 Beav. 232; *ante*, p. 83.

⁴ 20 Beav. 389; *ante*, p. 156.

believe that he did not intend to charge Major Bruce with these premiums? In *Triston v. Hardey* there was no evidence of any contract, and *Freme v. Brade* was a case of debtor and creditor, not principal and agent. If he did not effect these policies on account of this debt, he had not an insurable interest in the life of Major Bruce. [They cited *Courtenay v. Wright*,¹ and *Phillips v. Eastwood*.²]

LORD HATHERLEY, L. C. This case seems to come within principles recognized by the court, and the authorities on the subject are so clear, that we have only to consider what is the effect of the evidence.

The court requires distinct evidence of a contract: that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums; and in that case the policy will be held in trust for the debtor. I must, therefore, examine whether such a contract has been established in this case.

Now there is really no proof whatever of a contract, and I think the evidence would satisfy any jury that Major Bruce never knew anything about these premiums being charged against him, though, no doubt, he was aware that policies had been effected.

Mr. Garden might, perhaps, have produced his books, and have endeavored to charge these premiums against Major Bruce if events had turned out differently; but that would not bind Major Bruce, and I cannot find any evidence that he was ever informed that these premiums had been paid, and that he was charged with them; in fact, the evidence, as far as it goes, is rather the other way. He was certainly aware that the policies had been effected, but they were not in his name, but in Mr. Garden's. There was a great deal of correspondence, and a large number of letters from Major Bruce were scheduled; but the plaintiff has referred to none of them, and the fact that so many letters were written without reference to these premiums is, in itself, of much importance. Also, I think the letter of the 19th of March very important, and I find nothing to lead me to believe that Major Bruce would have agreed to be charged 10 per cent. on these premiums, if the account had turned out the other way. There is no trace of any letters from Mr. Garden to Major Bruce, and I conclude that none can be found.

¹ 2 Giff. 337.
VOL. III.

² Ll. & G. temp. Sugd. 270.

Norris v. Caledonian Insurance Company.

The vice-chancellor appears to have founded his judgment, in a great measure, upon the fact that some of the bills accepted by Major Bruce exceeded the amount due by him; but these bills were all for round sums, and seem to have had no reference to any balance. They were never paid, and, in fact, were merely means of raising money, and cannot be treated as leading Major Bruce to believe that he was liable for these larger sums.

Mr. Garden has kept his account in a particular way, and probably might have endeavored to charge these premiums in a different state of things; but there was not much chance of his recovering them against Major Bruce's estate, and there was no contract between them.

On the authorities, *Freem v. Brade*,¹ and *Brown v. Freeman*,² I do not see how I can decide otherwise than that the plaintiff has not made out any case.

I must discharge the order of the vice-chancellor, and dismiss this bill without costs.

Solicitor for the plaintiff: Mr. G. E. Philbrick.

Solicitors for the defendant: Messrs. Weir & Robins.

NORRIS vs. CALEDONIAN INSURANCE COMPANY.

(Law R. 8 Eq. 127. Coram Romilly, M. R. 1869.)

Mortgaged policy. Lien. — A policy of assurance was assigned by L. to S. as a security for a judgment debt due from L. to S., on which S. had created a charge in favor of V. The premiums were paid by S. during his life, and after his death by his administrator, at first of his own authority, and afterwards by the direction of the court in an administration suit. *Held*, that, as against V., the administrator of S. had a lien upon the money payable under the policy for the amount of the premiums paid by him, but not for the premiums paid by S.

On the 3d of February, 1846, Richard Lalor gave to John Sadleir his bond, with a warrant of attorney for confessing judgment thereon, upon which judgment was entered up as of Hilary term, 1846, for £1,800, to secure £900 due from him to Sadleir, with interest at 6 per cent.

On the 25th of February, 1847, Sadleir gave to Vincent Scul-

¹ *Ante*, p. 182.

² 4 De G. & Sm. 444.

ly, to whom he owed £8,000, a letter, by which he agreed to charge certain securities, of which a list was prefixed to the letter, with all sums then due, or to become due, from him to Scully; this list contained the following item: "Richard Lalor's judgment, 500." Lalor died in 1846. By a deed dated the 18th of April, 1850, Lalor's administratrix assigned to Sadleir a policy of assurance in the Caledonian Insurance Company for £4,999, 19s. on the life of the survivor of three persons, which was part of Lalor's estate, and was subject to an equitable mortgage to the insurance company for £250, in trust to retain out of the policy moneys £1,407 4s., (of which £1,010 5s. 7d. was due to him on the security of the judgment, and £396 18s. 5d. was due to him from Lalor's estate on other accounts,) with interest at 6 per cent., and also such further sums of money as should be due to him for principal and interest and for his further advances in keeping up the policy, with interest thereon at the same rate, at the time when the policy money should be received, and to pay the residue to Lalor's administratrix; and Sadleir covenanted to pay the future premiums, and all other sums which should be required for keeping up the policy.

Sadleir died in February, 1856, intestate; the plaintiff, Anthony Norris, took out administration to his estate in England and Ireland, and in October, 1856, instituted a suit in the Irish court of chancery for the administration of his estate, in which, on the 10th of December, 1856, a decretal order was made, directing the usual administration accounts.

On the 30th of May, 1860, the master to whom the suit was referred made a ruling in these words: "Richard Lalor. Continue to pay the premiums until further order."

Scully brought in a claim for £6,250 against Sadleir's estate, under the letter of the 25th of February, 1847, and claimed a lien upon the policy for that amount; and on the 17th of July, 1861, the master made a ruling, declaring him entitled to a lien on the policy to the extent of Sadleir's interest in the judgment.

Sadleir in his lifetime, and after his death the plaintiff, as his administrator, paid the premiums on the policy, and the interest on the mortgage debt of the insurance company, until the death of the survivor of the three persons named in the policy, which took place in September, 1867.

The policy money was claimed by the plaintiff and Scully, and

also by a Mr. and Mrs. Kenny, who were judgment creditors of Lalor, and who alleged that the assignment of the policy to Sadleir was void as against Lalor's creditors, and also by the official manager of the Tipperary Joint Stock Bank, who alleged that Sadleir was a trustee for the bank of Lalor's judgment, and the securities for it.

In March, 1868, the plaintiff instituted this suit against the insurance company, Scully, Mr. and Mrs. Kenny, and the official manager of the bank, for the purpose of having the rights of all parties in respect of the policy money declared. In June, 1868, the company paid into court £4,716 5s. 9d., being the balance of the money after deducting their mortgage debt, interest, and costs.

According to the plaintiff's evidence the amount due on the security of the assignment of April, 1850, considerably exceeded the fund in court, and according to Scully's evidence the amount due to him on the security of the letter of the 25th of February, 1847, considerably exceeded the amount due to Sadleir's estate on the security of Lalor's judgment.

The plaintiff admitted that "Lalor's judgment, 500," in the list prefixed to the letter of February, 1847, was the judgment of 1846, to secure which the policy was assigned, and Scully's counsel at the bar admitted that he could only claim against the policy money in respect of the amount due on the judgment *pari passu* with the plaintiff's claim in respect of the other debts secured by the assignment of the policy.

The claims of the Kennys and of the Tipperary Bank were rejected by the court, but this report is confined to the questions between the plaintiff and Scully.

Mr. *Hardy*, Q. C., & Mr. *Higgins*, for the plaintiff. It is admitted that the judgment referred to by Sadleir in his letter to Scully was the judgment for £900, for which the policy was afterwards made a security; but we contend that the effect of the letter was to create a charge on the judgment only to the extent of £500, and Scully's lien on the policy money must be limited to £500 and the interest on that sum. But the first charge on the policy money is the amount expended by Sadleir and the plaintiff in the payment of the premiums and the interest on the mortgage to the insurance company, such expenditure being in the nature of salvage, without which the policy would have been

lost: *Clack v. Holland*,¹ *Drysdale v. Piggott*,² *West v. Reid*,³ and the plaintiff is entitled to interest on the moneys so expended at 6 per cent., that being the Irish rate and the rate borne by the judgment debt. *Purcell v. Purcell*.⁴

Mr. Mackeson, Q. C., & Mr. W. W. Cooper, for Scully. The letter created a charge upon the whole amount of the judgment debt, the figure 500 being simply a *falsa demonstratio*. As to the premiums and interest, neither Sadleir nor his representative have any lien on the policy money as against Scully. Sadleir was mortgagor, and Scully mortgagee of the judgment and of the policy, which was a security for the judgment, and a mortgagor has no lien against the mortgagee for money expended in preserving the mortgaged property. A mortgagor paying off the first mortgage cannot set it up against the second mortgagee; *Frazer v. Jones*,⁵ *Otter v. Lord Vaux*; ⁶ and a mortgagor of renewable leaseholds has no lien against the mortgagee for the fines paid on renewal of the lease. In *Clack v. Holland*, the premiums were paid by a trustee; in *Drysdale v. Piggott*, and *West v. Reid*, they were paid by the creditor. The plaintiff is in no better position than Sadleir; he might have allowed the policy to drop, or he might have sold it, as in *Hill v. Trenery*,⁷ and *Beresford v. Beresford*,⁸ and Scully could not have required him to pay the premiums; but Sadleir had covenanted with Lalor's administratrix to pay the premiums, and the plaintiff had a right, at all events until the decree in the administration suit, to pay the premiums in pursuance of the covenant out of Sadleir's assets. The executor or administrator of a mortgagor of leaseholds could not claim a lien on the mortgaged property for premiums paid for insuring it against fire or for rent. [They also referred to *Burridge v. Row*.⁹]

Mr. Bird, for Mr. and Mrs. Kenny.

Mr. Ramadge, for the official manager of the Tipperary Bank.

Mr. Smart, for the insurance company.

The MASTER OF THE ROLLS, after disposing of the claims of

¹ 19 Beav. 262.

³ 2 Hare, 249.

⁵ 5 Hare, 475.

⁷ 23 Beav. 16.

² 8 D. Gex, M. & G. 546.

⁴ 2 Dru. & War. 223, n.

⁶ 2 K. & J. 650; 6 De G., M. & G. 638.

⁸ Ibid. 292.

⁹ 1 Y. & C. Ch. 183, 583; ante, p. 28.

the Kennys and the Tipperary Bank, expressed his opinion that the letter of February, 1847, gave Scully a charge on the whole amount of the judgment debt, but called for a reply upon the question of the lien claimed in respect of the premiums and interest.

Mr. *Hardy*, in reply. The policy was not mortgaged by Sadleir to Scully, and Scully could only claim the benefit of the mortgage of the policy, on the ground that Sadleir was a trustee for him of the security for the judgment on which he had a charge, and he could only avail himself of this security upon the same terms upon which Sadleir held it, viz., of paying the premiums and the interest on the prior mortgage. If Scully had claimed the benefit of the policy in Sadleir's lifetime, Sadleir might have refused to pay the premiums, and Scully cannot now claim the policy money except upon repayment of the premiums and interest paid by Sadleir and the plaintiff as his trustees. But even if there is no lien for the premiums paid by Sadleir, the premiums paid by the plaintiff, at all events since the administration decree, must be repaid, otherwise Sadleir's assets will have been applied for the sole benefit of Scully, the mortgagee, at the expense of all the other creditors.

May 25th. Lord ROMILLY, M. R., after stating the facts, and referring to the claims of the Tipperary Bank and the Kenneys, continued:—

This reduces the matter to the claim of Mr. Vincent Scully. What he obtained by the letter from Sadleir, which I have read, was an assignment of the judgment to secure payment of what was due to him from Sadleir. The assignment of the policy was to secure payment of the debt due upon that judgment, and he is therefore entitled to a lien upon the policy; in fact, he only claims a *pari passu* charge with the plaintiff's charge in respect of the £396 18s. 5d. due from Lalor's estate to Sadleir on the other accounts, to secure which the policy was assigned, and the sole question that remains is, whether the sum paid in the shape of premiums for keeping up the policy must be repaid first, before the rest of the fund in court is divided. On the part of Mr. Scully it is urged that moneys paid by a mortgagor to keep up the mortgaged property cannot be claimed against the mortgagee; that a prior mortgage paid off enures for the benefit of the subsequent mortgagee; and that the payment of ground rent,

quit rents, and the like, cannot be claimed against the mortgagee. I assent to these propositions, and though I do not think that this is exactly that case, I think that during the life of Sadleir it would have been difficult for him to require repayment to himself of the moneys advanced by him to keep up the policy before the charges on it were paid. But I think that in this case the legal personal representative does not stand in the same situation, and also that the rights of the parties are in a great degree settled and arranged by what took place in the suit in Ireland. I think that when Norris became the legal personal representative of Sadleir he was not compellable to keep up the policy of assurance and pay the premiums out of his own moneys or out of the estate of the intestate, and that if he did so out of the general assets of the estate of Sadleir, he could not properly, without the sanction of the court, after he had instituted proceedings, take the assets belonging to the general creditors for the purpose of keeping on foot a security which was specifically mortgaged; that, in fact, he was in the nature of a trustee, and that he held the policy in that character, and that the trusts were in the first place to keep up the policy, in the next place to distribute the proceeds amongst the persons who had charges upon it, according to their priorities. He might have borrowed money on the security of the policy for the purpose of paying these premiums, but the persons to whom, or for whose benefit the policy was assigned, could not require that the money so raised should be repaid out of the general estate of Sadleir; and, accordingly, the matter seems to me to have been settled by the ruling of the master in the Irish suit, which bears date the 30th of May, 1860, which contains a direction in these words, "Continue to pay the premiums until further order." Assuming that Norris might have given a preference to one class of creditors over another, which, after the suit was begun, appears to me to be very doubtful, it is certain that this is never done by the court, and, consequently, this order of the master under which Norris has paid these premiums till the policy fell, cannot be considered as altering the right of the parties, or giving any benefit to Scully over the other creditors of Sadleir, which he did not then possess. I am of opinion, therefore, that the first charge on the policy money is the repayment of the premiums paid by the plaintiff for the maintenance of the policy, together with interest at 5 per cent. per annum, and

The British Equitable Insurance Company v. The Great Western Railway Company.

that after payment thereof the residue must be divided *pari passu* between Scully and the plaintiff ratably, in proportion to the amounts due in respect of the judgment and the other debt for which the policy was a security. The costs of the plaintiff and of Scully will be paid out of the fund in court, but the other claimants can have no costs, neither have they to pay any.

Solicitors for the plaintiff: Messrs. *Parker, Rooke & Parkers*.

Solicitors for the defendants: Mr. *Wilkins*, Mr. *Manning*, Messrs. *Clarke, Woodcock & Ryland*, Mr. *Smart*.

THE BRITISH EQUITABLE INSURANCE COMPANY vs. THE GREAT WESTERN RAILWAY COMPANY.

(38 Law J. Ch. 132. Coram Malins, V. C. 1869.)

Misrepresentation. Assignment. — In July, 1863, B. negotiated for the insurance of his life in the plaintiff's office, and signed a declaration as to his health and habits of life, with a reference to his usual medical attendant, who certified that he was in good health. After examination by the medical officer of the company, he was accepted as a first-class life, but at an advanced rate of premium on account of his excessive corpulence. In August, pending the completion of the contract, B. went to consult a physician, who discovered that he was in a dangerous state of health, and suffering from disease of the kidneys, and warned him that care and abstinence from stimulants were necessary. B. never communicated this circumstance to the office. In September the premium was paid, and the policy effected. Eight months afterwards B. died suddenly from the effects of his disease. The declaration signed by B. in July required him, amongst other things, to name "his latest, if other than his usual, medical attendant." *Held*, that such declaration was continuing up to the date of the completion of the contract, and that the non-communication of his visit to the physician in the interval vitiated the policy.

Assignees for value of a life policy hold subject to the equities affecting the same; 30 & 31 Vict. c. 144, has not altered their position in this respect.

THIS was a suit to restrain an action at law commenced against the above named insurance company, by the Great Western Railway Company, for the recovery of £500, in respect of a policy effected upon the life of John Bird, of which policy they were assignees for value.

The claim was contested by the insurance company, on the ground of misrepresentation by the assured as to the state of his health.

The negotiations for the policy took place in June and July, 1863.

Bird, who was a small colliery proprietor and shopkeeper, then residing at Aberdare, being solicited by the company's agent

The British Equitable Insurance Company v. The Great Western Railway Company.

to insure his life in their office, applied for a policy in the usual form, and upon such application, signed a declaration in answer to certain inquiries (which were of an unusually stringent character) about his health and habits of life, accompanied by a reference to Mr. William Davies as his "usual medical attendant;" the declaration required him, amongst other things, to name "his latest, if other than his usual, medical attendant."

On the 20th of July, Bird was examined by the medical officer of the company, and reported to be a "first-class life," and, with the exception of his "full habit," in every respect healthy. On the 5th of August his medical attendant, Mr. Davies, certified him to be in good health, and a good life for insurance. He was accordingly accepted, "subject to the usual conditions," as a "good life;" but at an advanced rate of insurance (seven years added) in consequence of his excessive corpulence.

The notice of his acceptance by the company, which was sent to Bird on the 19th of August, stated that the premium was payable to their agent on or before the 9th of September, and that until the premium was actually paid, the company would not hold itself liable for any risk, and that any alteration in his health in the mean time would render the policy invalid, unless the same were disclosed in writing to the manager of the company, and the receipt of the premium subsequently authorized by him.

On the 8th of September, Bird paid the premium, and shortly afterwards received the policy, dated the 11th of September, 1863. The receipt for the premium was expressed to be subject to the conditions thereon indorsed, one of which conditions was, "If any variation shall have taken place in the health of the assured since the date of the medical examination, and before actual payment of the amount within expressed to be received, this receipt shall be void."

On the 17th of August, during the interval between the medical examination and the payment of the premium, Bird feeling "uneasy" about his health, in consequence of his increasing corpulency and constant drowsiness, went expressly to consult Dr. White, a well known physician at Cardiff. Dr. White pronounced him then to be in a dangerous state of health, and suffering, as the fact was, from "Bright's disease," and he sent a letter to that effect, inclosing a prescription, to Mr. Davies. It did not

The British Equitable Insurance Company v. The Great Western Railway Company.

appear whether Dr. White actually informed Bird of the nature of his disease, further than warning him to take great care of himself, and abstain from stimulants. Bird never communicated to the assurance company the fact of his having consulted Dr. White.

On the 17th of November, 1863, Bird assigned his policy for value to the Vale of Neath (afterwards amalgamated with the Great Western) Railway Company, and on the 19th of November the railway company gave notice of the assignment to the plaintiffs.

In May, 1864, Bird died suddenly from fatty degeneration of the heart. It was in evidence that his widow, Mary Bird, stated on oath at the coroner's inquest that her husband had suffered from heart disease and dropsy for the last two years of his life.

The defendants having commenced an action at law for the recovery of the policy in the name of the widow as administratrix, the plaintiffs filed their bill in this court, praying that the proceedings at law might be stayed, and the policy declared void, and delivered up to be cancelled.

Mr. Glasse & Mr. Shebbeare, for the assurance company. The declaration signed by Bird, on the 19th of June, must be treated as a continuing declaration up to the time of the completion of the contract in September. By that declaration he was in express terms bound to give true answers to the inquiries made in behalf of the company with respect to his health, and to withhold no material information. Even if the representations then made by him were true, or being untrue were the result of ignorance or innocent error, yet he was bound to communicate to the company the circumstance of his subsequent visit to Dr. White, and his non-communication of such a material fact pending the contract vitiated the policy *ab initio*. The case is stronger than *Traill v. Baring*, 4 Giff. 485; *S. C.* 33 Law J. Rep. (N. S.) Chanc. 521; *ante*, p. 233, and is completely governed by that decision. They also cited *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *S. C.* 21, Law J. Rep. (N. S.) Chanc. 633; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. Upon the question of jurisdiction, they referred to *Dalglish v. Jarvie*, 2 Mac. & G. 231, 243; *S. C.* 20 Law J. Rep. (N. S.) Chanc. 475; *The India and London Life Assurance Company v. Dalby*, 4 De Gex & Sm. 462; *Thornton v. Knight*, 16 Sim. 509; *Barker v. Walters*, 8 Beav. 92, 96; *S. C.* 14 Law J. Rep. (N. S.) Chanc. 37.

The British Equitable Insurance Company v. The Great Western Railway Company.

Mr. *Rowcliffe*, for the widow and administratrix, took no part in the argument.

Mr. *J. Pearson* & Mr. *Stevens*, for the railway company. This is not a case for the exercise of the concurrent jurisdiction of this court. *Slim v. Croucher*, 1 De Gex, F. & J. 518; *S. C.* 29 Law J. Rep. (N. S.) Ch. 273. The remedy is at law. In *Traill v. Baring, ubi supra*, there was an open contract, and no conditions were specified with reference to the avoidance of the contract. But here, upon the principle that *expressum facit cessare tacitum*, the assurance company contracted themselves out of the equitable rights which they otherwise might have been entitled to. Having chosen to protect themselves by certain specified requisitions, they virtually disclaimed the protection of this court in respect of any further information which the parties might, as a general rule, have been bound to volunteer. All that the court has to look to here is, whether the requisitions actually made were fairly and honestly complied with, upon the principle laid down by Mr. Justice Cresswell in *Jones v. The Provincial Insurance Company*, 3 Com. B. N. S. 65; *S. C.* 26 Law J. Rep. (N. S.) C. P. 272; *ante*, vol. 2, p. 431.

Was there any wilful or designed misrepresentation? *Fowkes v. The Manchester & London Life Assurance Company*, 3 Best & S. 917; *S. C.* 32 Law J. Rep. (N. S.) Q. B. 153; *ante*, vol. 2, p. 631. It is clear that the company satisfied themselves of Bird's health by the testimony of his usual medical attendant to whom he referred them, as well as of their own medical officer who examined him; and it has not been shown that any part of the declaration made by Bird was knowingly false, or that there was in fact any subsequent variation in his health before the completion of the contract. The symptoms of his disease he carried about with him in the most demonstrative form, and in consequence of his excessive corpulency a higher rate of premium was charged. That very circumstance might well have produced some anxiety about himself, and led to his going to consult Dr. White. But even assuming the policy to be void, as against Bird or his personal representative, that will not prejudice his assignees for value. By the recent act, 30 & 31 Vict. c. 144, life policies are made negotiable, and the assignees are not in the same position as assignees of other *choses in action*.

[His honor intimated that the object of the act was to enable

The British Equitable Insurance Company v. The Great Western Railway Company.

the assignee to sue in his own name, but it did not in any other way improve the position of the assignee. The 2d section expressly provided for the reservation of all equities affecting the policy.]

If the policy is declared void as against the defendants, there must be a return of the premium already paid. *The Prince of Wales, &c., Association Company v. Palmer*, 25 Beav. 605.

MALINS, V. C., (without calling for a reply,) said: In this case I think if the simple question had been whether or not the formal inquiries made by the plaintiff company as to the health and habits of the deceased had been so answered as to comply with the demands of truth and honesty, I must upon the whole have decided that they were so answered; and therefore if the risk had been incurred by the plaintiffs on or before the 16th of August, 1863, I should have held the policy good. But upon the 17th of August the position of the parties was entirely changed by the fact, about which there is no question, that on that day Bird went to Cardiff to consult a physician whom he had never before consulted, and his friend who accompanied him states in evidence that Bird was induced to go because he "felt uneasy about his health;" a fact, indeed, which is sufficiently indicated by the circumstance of his making an express journey for the purpose. Now, the evidence as to Dr. White's opinion is very explicit; and although it is said that Mr. Davies reassured Bird by telling him his complaint was only temporary, and that with care he would soon be better, there can be no doubt that Dr. White formed a more correct opinion as to the serious nature of the disease. (His honor referred at length to this part of the evidence, and continued): Now, without going into the question whether or not in fact any variation had then taken place in Bird's health since the time of his examination by the medical officer of the company, or since the date of Mr. Davies' certificate on the 5th of August, I have no doubt upon this point of the case that the declaration signed by Bird, requiring him to state his "latest, if other than his usual, medical attendant," though made on the 19th of June, must be treated as a continuing declaration up to the time of his payment of the premium; and therefore in my opinion he was bound to mention the circumstance of his having since been to consult Dr. White. Whether or not he communicated the result of the interview

The British Equitable Insurance Company v. The Great Western Railway Company.

may be immaterial, so long as he gave the office the opportunity of making such further inquiry as they might think fit; but knowing that the plaintiffs were acting upon the assumption that the declaration was true, it was incumbent upon him to give them notice of this circumstance, so materially affecting the accuracy of the statements therein contained.

The principle upon which this court acts is clear and well established. In all matters of contract it is the duty of either one of two contracting parties to communicate to the other all material facts within his knowledge relating to the subject matter of the contract; and if any such material facts be concealed, the opposite party will not be bound. The decision in *Traill v. Baring* appears to me to be conclusive upon the present case. For what was the importance of the fact there, the non-communication of which was held to vitiate the contract, compared with the importance of the fact which was not communicated here? Here the man whose life was to be insured is told that he is dangerously ill, and that without abstinence from stimulating liquors he will not recover. Clearly he was bound to tell the office that he had consulted another medical man, though I do not say that he was bound to inform them what the opinion of that medical man was. Such a communication would probably have influenced the conduct of the plaintiffs most materially; because if upon inquiry they had ascertained from Dr. White the state of Bird's health, it is not likely that they would ever have granted the policy. Upon this ground, therefore, I think the contract is vitiated; and, as I have already intimated in the course of the argument, I do not think that it can be contended that the defendants, as assignees of this *chose in action*, can be in any better condition than Bird himself, or his legal personal representative, would have been if there had been no assignment. In my opinion, therefore, they are not entitled to recover on the policy.

With regard to the argument that this is a case exclusively for the decision of a jury at law, I fully admit the great inconvenience of dealing with such questions in this court without the advantage of seeing the witnesses and observing their demeanor; but it is clear from the decision in *Traill v. Baring*, and many other cases of a similar kind, that this court is bound to pronounce upon the validity of such contracts, and I am not at liberty to decline the jurisdiction. All the authorities cited upon this point

The British Equitable Insurance Company v. The Great Western Railway Company.

go to the same effect ; that any contract affected as this is with fraud is cognizable in this court, although it may also be cognizable in a court of law. Here there was the suppression of a fact which ought to have been disclosed ; and, in deciding the case, I adopt the rule laid down by Mr. Justice Cresswell in the case of *Jones v. The Provincial Insurance Company*, with reference to the misrepresentation there alleged.

I think it is to be regretted that the plaintiffs should have disputed this policy, since it appears upon the evidence that it was at the instigation of their own agent that Bird insured his life, and upon the recommendation of their own medical man that they issued the policy ; there can, however, be no question but that I am bound, upon the general doctrine of this court, to declare the policy void *ab initio*, and it must be delivered up to be cancelled.

With regard to the costs, I at first thought that the decree should be without costs, having regard to the negligent conduct of the plaintiff's officers ; but after the decision in *Traill v. Baring*, which, in my opinion, completely covers this case, I think the defendants were bound to know that the suppression of such a material fact was fatal to the contract, and they should have held their hand and proceeded no further. Having, however, chosen to persevere in litigation, they must pay the costs. Each party must pay their own costs of the action at law. The defendants must be credited with the money which the plaintiffs have received by way of premium, together with interest. Mrs. Bird will get her costs from the plaintiffs, and they must recover them over from the defendants.

Solicitors : Mr. *H. Gover*, for plaintiffs ; Messrs. *Young, Maples & Co.*, for defendants ; Messrs. *Gregory, Rowcliffes & Rawle*, agents for Mr. *H. J. Hollier*, Aberdare, for the administratrix.

Shearman v. British Empire Mutual Life Assurance Company.

SHEARMAN vs. BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

(Law R. 14 Eq. 4. Coram Romilly, M. R. 1872.)

Payment of premiums after bankruptcy. — The mortgagor of a policy of insurance became bankrupt, but notwithstanding his bankruptcy, continued to pay the premiums on the policy: *Held*, that the premiums so paid were in the nature of salvage moneys, and ought to be repaid, with interest at 4 per cent., out of the policy moneys.

THOMAS POCKNALL, having insured his life with the British Empire Mutual Life Assurance Company, deposited the policy in 1863 with the plaintiff, as a security for a debt due from him to the plaintiff. In October, 1865, Thomas Pocknall was adjudicated bankrupt; but notwithstanding his bankruptcy he continued to pay the premiums up to the time of his death, which took place in July, 1870. After his death his widow and legal personal representative set up a claim to the policy moneys, and this bill was filed against the insurance company, the assignee in the bankruptcy, and the widow of Thomas Pocknall, seeking that these moneys might be applied towards payment of the plaintiff's debt, which exceeded the amount thereof.

The company paid the policy moneys into court and were dismissed. The assignee in bankruptcy disclaimed.

Previously to the institution of the suit the plaintiff offered to pay to Mrs. Pocknall a sum larger than the amount of the premiums paid subsequently to the bankruptcy, with interest thereon at 4 per cent.

Mr. *Method*, for the plaintiff.

Mr. *E. Ford*, for Mrs. Pocknall, contended that the bankruptcy relieved Thomas Pocknall from all obligation to pay the premiums, and therefore that the payments made subsequently to that time must be treated as if made by a stranger; and that, under these circumstances, the policy must be treated as being kept up for his benefit; *Foster v. Roberts*; ¹ or at all events, that he was entitled to a lien for the premiums and interest.

Mr. *Method*, in reply, cited *Burridge v. Row*,² *Clack v. Holland*,³ *Norris v. Caledonian Insurance Company*.⁴

THE MASTER OF THE ROLLS said that the plaintiff was clearly entitled to the policy moneys, but that the premiums paid sub-

¹ 29 Beav. 467.

³ 19 Beav. 262.

² 1 Y. & C. Ch. 83; *ante*, p. 28.

⁴ Law Rep. 8 Eq. 127; *ante*, p. 258.

sequently to the bankruptcy were in the nature of salvage moneys, and that the plaintiff must repay them to Mrs. Pocknall, with interest at 4 per cent. He was of opinion, however, that she ought to have accepted the offer made to her before the institution of the suit.

It was arranged that the costs of the suit should be treated as set off against the premiums, and a decree was made for payment of the policy moneys to the plaintiff.

Solicitors : Mr. *Sismey*, Mr. *B. Hope*.

In re ENGLISH ASSURANCE COMPANY : HOLDICH'S CASE.

(Law R. 14 Eq. 72. Coram Romilly, M. R. 1872.)

In estimating the value of a current policy in a life assurance company in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the same premium in a solvent office.

THIS was an application by way of adjourned summons under sect. 158 of the Companies' Act, 1862, and the question in the case, which was a representative one, was as to the proper mode of valuation of current policies or the proper amount for which holders of life policies were entitled to prove in the liquidation of a life assurance office, having regard to the Companies' Act, 1862, s. 158, and rule 25 of the general order under the act.

Mr. *Southgate*, Q. C., & Mr. *Field*, in support of the summons, relied on *Bell's case*.

Sir *R. Baggallay*, Q. C., & Mr. *Haddan*, for the official liquidator, referred to the decision of Lord Cairns in his arbitration on the Albert Life Assurance Company in *Lancaster's case*.¹

¹ Lord CAIRNS' judgment (Minutes of Proceedings in Albert Arbitration, p. 677) was as follows :—

I have now to dispose of the case which was brought before me for the purpose of determining the amount of proof upon policies and annuities, — *Lancaster's case*.

This is a question of considerable difficulty. I should have been very glad if I had found that any principle had been adopted by the court of chancery in the course of the winding-up which would have been applicable, upon satisfactory grounds, both to policies and to annuities, and which, therefore, I could have followed without any further examination. I have been unable, however, to satisfy myself that any principle has been adopted by the court of chancery which will apply upon sound and clear grounds to the case of policies

April 16. Lord ROMILLY, M. R. This is a summons adjourned from chambers, and is one of great importance; not

of insurance and of annuities, and which would in my opinion be consistent with the enactments of the act of 1862.

In considering the question, I have to deal with the case, and only with the case, of those life policies and annuities which were actually current at the date of the winding-up. Where instalments of an annuity had actually become payable, or where a life policy had actually become payable before the date of the winding-up, there no question as to valuation arises. The claim would be admitted for the actual sum that ought to have been paid before the winding-up. I have to deal with those cases where the policy or the annuity contract was current at the date of the winding-up. There are in some or all of the companies other contracts of a more special kind — for instance, endowments, and contracts of survivorship; but the general observations will apply, with an alteration of detail only, to those other cases.

[After considering the case of an annuity contract his lordship proceeded as follows : —]

I now come to the case of policies of insurance. I take at present whole-life policies. I may repeat shortly what I have often had occasion to say here. What is the nature of the contract of insurance? It is a contract by which the insured is under no obligation to pay the premiums, — it is a contract by which the company insuring is under no obligation to continue its business; but the company undertakes that if the person insured will pay the fixed premiums from year to year, the funds of the company for the time being, including the unpaid capital, shall be answerable in proper order to pay the sum insured on the falling in of the life, and on proper proof of that event being given to the company.

That being the nature of the contract, it is to be observed in the first place, that at the date of the winding-up, taking it distinctly as at that moment of time, there is no breach of the contract. (I have said that where the life has dropped before the winding-up a policy of that kind stands in a different position; it is an actual claim for the whole amount.) It is also to be observed that we have here to deal, not with the case of a going company which is being sued for a breach of contract. Indeed, it is very difficult to see, in a case of a policy of insurance, how there can be any breach of contract short of a refusal to pay upon the falling in of the life. I know it has been suggested that a refusal to receive the premiums from year to year would be a breach of the contract, and that thereupon an action might be brought. I do not desire to express any opinion upon that point, but it is somewhat difficult to see how such an action could be maintained, and certainly, as far as I know, no such action has ever been brought or maintained. But all that may be set aside here, because, whether an action could or could not be maintained for a refusal to receive the premium, I repeat that at the date of the winding-up, even in that sense, there was no refusal to receive the premium, and therefore no breach of contract. If, however, a going company were sued for a real breach of the contract, that is to say, for the non-payment of the sum insured, there, again, it is difficult to imagine how there could be any damages other than the

merely from its being a representative case which must affect a great number of other cases, but one which will constantly recur

amount which was covered by the policy, which ought to have been paid. In the case with which I have to deal it is only, as it seems to me, under the operation of the 158th section and the 25th rule that policies current at the date of the winding-up can be provided for, and claims in respect of them entertained under the winding-up at all. I should have thought that, but for an authority in the court of chancery, which I shall presently refer to in detail, namely, *Bell's case*, (Law Rep. 9 Eq. 706,) the course pointed out by this section and this rule was clear. It is well known what putting an estimate on the value of an insurance means. Persons may differ as to the table by which the valuation is to be made, or as to the rate of interest to be taken; but the way in which the value of an insurance is to be estimated is a thing perfectly well known, and the thing is attempted and succeeded in every day; and I should have thought, but for the decision to which I have referred, the course under the 158th section and the 25th rule was a clear one, and as simple as any somewhat difficult problem of arithmetic could be made.

The effect of the decision in *Bell's case*, however, as I understand it, is this. The court there held that this mode might be adopted of valuing a policy. You might select another company with premiums the same as the Albert, with capital and guarantee proprietary fund as nearly as possible the same as the Albert had, or, at all events, professed to have. You might then go to that company and find for what premium the company would now insure the life of a person insured in the Albert, after examining, if necessary, his state of health, and then, when you had found the premium which the person insured would have to pay to this new company at the present time, and had compared that with the premium he before paid for the same amount to the Albert, and had taken the difference between the two premiums, and had capitalized that difference, having regard to the expectancy of life, you would then have the amount which ought to be paid to the person insured to put him in as good a position as he would have been in if the Albert Company had not been wound up. Now, so far as that sum arises from the mere difference of age, introducing no other ingredient into the case, but taking, for instance, a person who was insured in the Albert at the age of twenty-five, and who is to be reinsured in this supposed company at the age of fifty, not looking at any difference in the state of health, at one time and another, but merely looking at the difference of premium for a man of twenty-five and a man of fifty, — so far as the decision was founded on those elements, the decision would have supplied a not inaccurate mode of arriving at an estimate of the value of the policy. If there was nothing more, then I should have been willing to have followed that principle. But the difficulty I feel is in following the decision so far as it introduces into the case other elements, namely, the reëxamination and the consequences of the reëxamination or the non-examination of the lives to be insured by the new company. Because the decision goes to this, that if the particular person whose life is proposed for reinsurance has in the mean time passed into a state of health which either makes him non-insurable or makes him insurable only upon more disadvantageous terms than formerly, or

whenever an assurance company has to be wound up in a court of equity. It is also a case which has given rise to great con-

if the life to be reinsured cannot be produced for reëxamination, in all those cases the person is under some peculiar and special damage arising in his own case, — a special and peculiar damage separate from the question of the value of his policy, and practically provision is to be made out of the assets of the company for that particular and special damage.

Now I have considered *Bell's case* (Law Rep. 9 Eq. 706) with great anxiety, as the decision of a judge for whose opinion I have the highest possible respect, and who appears in that particular case to have taken very great pains to give weight to all the arguments which were addressed to him in support of the different views that were then proposed to the court. I will state shortly the reasons which make me unable to follow the part of the decision which I have last adverted to.

In the first place I find, judging from the report, that neither in the arguments before the court, nor in the judgment of the learned judge, was any reference whatever made to the section of the act which I have mentioned or to the 25th rule. In point of fact, the date of the winding-up order mentioned in the 25th rule was not taken at all as the date for valuation, but a period altogether different, namely, a period at the close of the time covered by the last premium that was paid. I cannot help thinking that, if the section and the rule had been prominently brought before the court, the court would scarcely have arrived at the conclusion it did in *Bell's case*.

In the next place, in my opinion, the problem to be solved under the act being the finding of a just estimate of the value of the policy, the special damage sustained by a particular individual has nothing whatever to do with the value of the policy. In the course of the argument I put a case that will illustrate sufficiently my meaning. Take the case of A effecting an insurance on the life of B. B is abroad. The object is that A should be reinsured in a new company. The new company will say: "You must produce the life, so that we may examine him." He being abroad will not come at all; or, being at a great distance from England, says: "I will come home to be reëxamined if you pay my expenses home and back again, which will cost £200." The question that occurs to my mind is, what possible equity can there be in the distribution of assets to make the other policy holders pay this £200 (because it must be paid out of their money) in order to indemnify the particular policy holder A for the expense of bringing to this country the life that is to be inspected for reinsurance? In point of fact, special damage seems to me to be a thing relating entirely to a class of ideas different from the class of ideas entering into the question of the valuation of a policy for the purpose of paying its value out of assets. Special damage would apply to the case I supposed some time ago of an action brought against a going company for a breach of contract, in which case a jury may be directed to take into account the special damage done to the particular individual.

The next point in regard to *Bell's case* (Law Rep. 9 Eq. 706) which I have to observe upon is this: the mode of valuation there adopted involves the question of what another company would think of the health of the person

trariety of opinion amongst actuaries and all persons connected with assurance companies. It has been decided in one way by

formerly insured in the company being wound up. Now, in the first place, that raises the inquiry not merely of what the state of health of the person is, but retrospectively what the state of health of the person now to be examined was at a period nearly two years past and gone, as to which the state of health of any person must be merely a matter of speculation and conjecture. Further than that, it introduces not merely opinion evidence as to the state of health, which is never satisfactory, but opinion evidence of the worst possible kind, because it is to be the opinion evidence of another company, or the officers of another company, who are not going actually, or may not be going, to insure the life; for there is to be no obligation after all upon the other company to insure the life, and no obligation upon the person making the claim to insure himself in the other company. It is opinion evidence, again, which you have no means of checking, because the inquiry proposed by the court is, what would another company do if it were asked to insure the life? The only answer to that can be from the other company, that they would either insure the life or not, or would insure it for such an additional sum, and from the very nature of the case that is evidence which cannot be controverted, because it is not evidence of a fact, but evidence merely of a speculative opinion.

Further, the test proposed in *Bell's case* substitutes a solvent for an insolvent company, and under the guise of attempting to put the person insured in as good a position as he was in before, the mode adopted would put him in a very much better position.

Then this alone would be to my mind an insuperable difficulty in adopting the principle of *Bell's case*, — the principle of that case is not homogeneous with the mode of valuing annuities adopted by the court of chancery in this winding-up. Annuities are proposed to be valued precisely on the principle of taking the value of the annuity as a piece of property, and not on any question of special damage sustained by the annuitant. Therefore, in dealing with assets, of which there must be a distribution between annuitants and policy holders, and which ought to be distributed on homogeneous principles as between the two classes of claimants, the court would be dealing with one class of claimants in one way and with the other in a perfectly different way, and instead of dividing the assets equitably would be dividing them inequitably.

I am, therefore, unable to follow the mode of valuation suggested in *Bell's case*, and after the best consideration which I am able to give to the subject, and after fortifying myself with the best advice which I could procure from the best authorities, I have come to the conclusion that there must be what is termed and well known as a pure premium valuation as at the date of the winding-up order, the rate of interest assumed being four per cent., and the tables being the Seventeen Offices Experience Tables. The principle will be adopted in this way. There must be determined on the one hand the present value of the reversion in the sum assured at the decease of the life, and on the other the present value of the future annual premiums. The difference between these two sums represents the value of the policy. But the annual premium payable is divisible into two parts: first, the part which it is calculated

the present Lord Justice James, when vice-chancellor, in *Bell's case*, and that decision has been carefully examined and elaborately commented upon by Lord Cairns, who has come to an opposite conclusion in *Lancaster's case*, while acting as parliamentary arbitrator in the Albert Assurance Company.

The question therefore is one not only of considerable difficulty, but one which will probably have ultimately to be determined by the highest court of judicature in this country.

The question may be stated in the shortest possible terms. It is this: For what amount is the holder of a life policy in the company under liquidation entitled to prove against the assets of the company?

The Lord Justice James, when vice-chancellor, decided that this was the rule to be followed: Select another company of perfectly solvent reputation, with premiums the same as those of the company in course of liquidation: find for what premiums that company would now insure the life of the person assured in the company in course of liquidation; the person whose life is assured is to be at liberty to show that his then state of health is such that the new company would require a higher premium than that which would have been required merely from the lapse of years, and then, having ascertained the increased premium which the person seeking to prove would have to pay to the new company at the present time, take the difference between the two premiums and capitalize that difference, having regard to the expectancy of the life of the person in question; and that will give you the amount which ought to be paid to him to put him into as good a position as he would have been in if the company in course of liquidation had not been wound up.

Lord Cairns states his apprehension of the rule as laid down by the Lord Justice James very much to the same effect.

will provide for the risk, called the pure premium; and secondly, the addition for office expenses and other charges, which is sometimes called the loading. The pure premium only is to be taken into account. The value of the policy, therefore, will be the difference between the value of the reversion in the sum assured and the value of a life annuity of an amount equal to the pure premium.

The observations I have made put out of the case altogether the question of any peculiar mode of valuation of profit policies. That I consider to have been properly dealt with by the court of chancery. The portion of the premium attributable to the sharing of the profits is altogether out of the case.

Lord Cairns, after examining that judgment, comes to the following conclusion: "There must be what is termed and well-known as a pure premium valuation, as at the date of the winding-up order, the rate of interest assumed being £4 per cent., the tables being the Seventeen Offices Experience Tables. The principle will be adopted in this way: There must be determined on the one hand the present value of the reversion in the sum assured at the decease of the life, and on the other the present value of the future annual premiums. The difference between the two sums represents the value of the policy. But the annual premium payable is divisible into two parts: first, the part which it is calculated will provide for the risk, called 'the pure premium;' and secondly, the addition for office expenses and other charges, which is sometimes called 'the loading.' The pure premium only is to be taken into account. The value of the policy therefore will be the difference between the value of the reversion in the sum assured and the value of a life annuity of an amount equal to the pure premium."

Lord Cairns proceeds entirely upon the 158th section of the Companies' Act, 1862, and the 25th rule of the General Order of November 11th, 1862, issued under the authority of that statute. The section is in these words: "In the event of any company being wound up under this act, all debts payable in a contingency and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made as far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or for some other reason do not bear a certain value."

The 25th rule of the general order is in these words: "The value of such debts and claims as are admissible to proof by the 158th section of the said act shall so far as is possible be estimated according to the value thereof at the date of the order to wind up the company."

The real question is this: What is a fair sum to force a man to take at the date of the winding-up in lieu of a fixed sum contracted to be paid at the time of his death?

It appears to me the first thing to be ascertained in considering this question is, what is the contract which has been entered into between the assured and the company; remembering always that

this is not the case of a mutual assurance company, where the policy holders are partners, but strangers, who are contracting with each other. The contract I take to be this : A insures his life with the company for payment of a given sum at A's death, without profits, in consideration of A paying an annual premium to the office of a given amount. A on one side, to entitle himself to the sum assured, has to pay, as long as he lives, the annual premium to the company ; the company, on the other hand, contracts that when A dies they will pay the amount assured, and that no accident or disease which may curtail the chance of living of A shall entitle the office to increase the premium.

The conclusion at which Lord Cairns has arrived appears to me to overlook this point in the real contract which is made between a person who insures his life, and the assurance company. If there were no such things as diseases or accidents, but all men lived to an age when the body decayed by age, more or less rapidly, according to the strength and nature of the constitution, a pure premium valuation would appear to be an easy mode of solving the difficulty ; but it is obvious and indeed notorious that most, if not all persons who insure their lives do so expressly to guard against the contingency that an unexpected disease or an unforeseen accident may shorten their life, and prevent it from running what, without the occurrence of such contingency, would be the probable term of its duration. It is obvious also that such diseases and such accidents are taken into account by the assurance office upon an average of the lives assured, and form an item in the scale of mortality on which the company calculates the amount of the premium to be paid. You deprive the assured of the benefit of his contract if you do not give him compensation for an accident which has made his life uninsurable, and consequently his policy more valuable, at the time when the company is wound up.

Suppose such a case as this, and see how it would work under Lord Cairns' plan. Two persons of the same age insure their lives, each for the same sum in the same office for the same premium. The company is wound up. One dies a month before liquidation begins ; the other, whose health has become seriously impaired, dies shortly after the liquidation has begun. One is entitled, according to every rule, to prove for the whole amount of the sum insured ; the other must submit to a reduction which,

according to Lord Cairns' plan, will deprive him of the greater part of the sum assured, while according to Lord Justice James, he is entitled to such a sum as would be sufficient to induce a new office to give the assured a policy for the same amount at the former premium.

Lord Cairns seems to be of opinion that the 158th section and 25th rule make it imperative that the proof shall, when made, be for a sum to be ascertained at the date of the order to wind up the company. But the rule itself notices that in many cases this must be impossible, and accordingly inserts the words, "so far as is possible." Now, I am of opinion that this is one of the cases where such ascertainment of the value of the proof is not possible. No doubt the day of the winding-up order is the time at which the value of the policy or annuity is to be calculated; but subsequent facts may be given in evidence for the purpose of showing what the real value was at that time, such as the sudden death of the annuitant or of the assured, in one case a benefit to the company, in the other to the estate of the assured. If in every case the day of the death of the assured could be ascertained, the problem would be a very easy one, and ought to be calculated on the principle of the value of the reversion less the value of the annuity, both calculated to the day of the death of the assured. This is, from the nature of things, impossible, but an approximation to it is attained, not merely from the age of the assured, but also from his state of health. If the state of health of the assured be varied, and such variation has been provided for and forms a part of the contract, then the principle adopted by Lord Cairns appears to me to be no longer applicable. If, as I believe, it be clear to demonstration, that the chance of the premature termination of the life of the assured from causes other than gradual efflux of age forms one of the principal motives for assurance, and one of the contingencies the possible occurrence of which is contracted for, why should not this form part of the proof, if, by the occurrence of it, the assured has sustained a special damage? Any other matter that forms part of the contract must follow the usual course in such cases. For instance, if it formed part of the contract that the policies should be valued according to any particular principle or by any specified table of mortality, then this would supersede all other questions. If a particular rate of interest were specified

in calculating the value, this would be followed ; if no scale of interest were specified, the chancery scale of £4 per cent. might then be adopted.

Consider the case of a contract made for sharing in the profits to be made by the office. This being the case of a company under liquidation, no profits have been made, and therefore the assured gets none ; but all persons agree that the assured cannot for that reason require the extra amount of premium he has paid in the hope of profits to be repaid to him, because he has contracted for a matter necessarily uncertain, the occurrence of which was doubtful, and which has not occurred. Why, in all these cases, should the contract be followed, and not in the present case, where, if I am right, the contract expressly undertakes to provide for the special damages which fever or accident may bring upon the assured, and not to require any addition to the premium if any such event should occur which abridges the chances of life ? Suppose an office to contract with the assured that if he should be attacked with a pulmonary complaint he will pay an additional premium. He would be compelled to perform his part of the contract. Why is not the company to perform their part of the contract, if his insurance, by reason of the same circumstances, has become of double its former value ?

The second objection urged by Lord Cairns to the principle of the decision in *Bell's case*¹ does not appear to me to be well founded. That case, as it appears to me, very properly lays down that, unless the contrary is shown, all lives will be assumed to be in a normal state, and that no change has taken place other than that which arises from the advance of age ; but it appears to me that, from accident or illness, a higher rate of insurance is required, that being a circumstance of special damage contracted against, it may be taken into consideration in ascertaining the amount of the proof, and the burden of proving it lies on the person who seeks to prove. The suggestion of the instance given by Lord Cairns, where it requires £200 to produce the life insured, would apply in like manner to every case where the proof of a debt involves considerable expense, and the question of who is to bear the cost of reëxamination is a separate matter.

In the case supposed you must give evidence to satisfy the

¹ 1 Law Rep. 9 Eq. 706.

court, which evidence is to be laid before another office, not for the purpose of asking that office to insure the life unless the person applying desired to effect such insurance, but for the purpose of asking that office what, in that case, would be the additional premium they would require to insure the life in question. The amount of the evidence given of the accident or illness, or the state of health of the proposed life, would in every case be subject to the control of the court, and might be objected to by the official liquidation on behalf of the company, as in the case of the proof of any other debt, and only what was proper allowed. Assume that the proof ought to be given of the state of the life at the date of the order to wind up, the subsequent state of health of the assured up to the time of taking in the claim would properly be given in evidence, as affording evidence of the value of the life at that time. Neither do I understand the force of the last objection urged by Lord Cairns — that it introduces not only opinion evidence as to the state of health, but opinion evidence of the worst possible kind, because it is the opinion evidence of another company, who are not going to insure the life. Now it is true that opinion evidence is always uncertain, but it is, in the nature of things, evidence on which, in a vast variety of cases, a court of equity is compelled to act. The great objection to it usually is that it can never be tested by any indictment for perjury, and is too often given with a bias in favor of one side even by perfectly honorable and fair men, and often without their being conscious of the bias ; but if there be one species of evidence of opinion more trustworthy than another, it is, as it appears to me, the opinion of an assurance office on the life of an applicant, not only because they can have no bias either for or against the claimant, and because their opinion may immediately be tested by the application for a fresh life policy by that claimant, or by the application for an annuity for life, either of which tests the office, it is obvious, cannot refuse to submit to, if they should be required so to do, as long as they carry on business.

The case in reality seems to resolve itself into this : the office has contracted to give the assured the pecuniary advantages which may arise to him from accident or disease ; is the office, because it has been compelled to undergo a course of liquidation, to escape from the compliance with this part of their contract ? And if so, for what reason ? Can it be because it is difficult to

ascertain? or because it is liable to error? all of which they knew and undertook when they accepted the life. If so, a new principle would be introduced in ascertaining the damages sustained by one party to a contract from the breach of it by the other, — a principle, I venture to say, of great danger, and extremely difficult of application, if the court is to determine what species of damage is to admit of no compensation.

Two healthy young men of the same age insure in the same office for the same premium; they meet with the same accident in a railway carriage; one is killed on the spot a few days before the order for winding-up. His estate proves in full against the office; the other survives a fortnight, and according to Lord Cairns' principle his estate proves for little or nothing. Surely the deterioration of his life, which by the express contract of the company was not to retard or diminish their liability to pay the full sum assured whenever he might die, ought to be taken into account. Observe also the case of annuities; the same rule must apply both to policies and annuities. The deterioration of the health of the annuitant is a benefit to the company. Suppose a young annuitant die suddenly after the winding-up, but before any fresh payment of an annuity on his life has occurred; is the company to pay to his representatives a sum calculated on the hypothesis that he may live twenty-five years? If it be said that in such a case the company has performed their part of the contract, and are not further liable, does not a like principle apply if at the date of the winding-up order he had a mortal complaint, but might linger for a year? In either case I think the rule must be, what would buy a similar policy or a similar annuity from a perfectly safe office? In one case the burden of proof, the deterioration of the life, falls on the assured or his representatives; in the case of the annuitant it falls on the company; but in either case the investigation may be waived by the party interested. I am also unable to understand how, according to Lord Cairns' plan, the pure premiums, and that portion which he calls "loading," are to be ascertained. I do not believe that there is the same system in all offices, even in those of the best regulated description. Who is to be judge what it was in the office under liquidation? and how is it to be determined? Part of it is composed of the profit premiums of the persons who contracted for a share of profits. Is this to be deducted?

It appears to me to be the introduction of a merely arbitrary rule assigning to an office a calculation which may or may not have made the basis of their tables, but which assuredly was not the contract entered into by the parties to it, but which is a new contract which the court of chancery, for its own convenience, thinks fit to substitute for the real contract. I am also unable to understand the principle which makes such a distinction between the case of non-profit policies and that of profit policies, and between them and annuities.

In the case of profit policies the whole of the premiums must be calculated without any deduction; in the case of annuities the whole value of the annuity for the probable duration of life is to be calculated without any deduction. Why is the premium in the case of a non-profit policy to be treated differently, and an attempt made to separate in an arbitrary manner, by a sort of rule of thumb principle, what is loading and what is not? — a method which, in nine cases out of ten, was not adopted by the company in question in calculating the tables which formed the basis of the contract. The assured has contracted to pay a certain premium without reference to any question of loading or not loading; that is his contract; why is he not to pay it, or the value of the policy, to be calculated as if he had only to pay a portion of it? The whole plan suggested by Lord Cairns' decision appears also to me to involve a false principle, which makes the circumstance of insolvency alter the proportionate part of the assets of a company to which a class of the creditors is to be entitled, so that, while before the liquidation they were entitled to one proportionate part, after the liquidation they would be entitled to another proportionate part of the assets.

I have given the subject the best consideration I have been able, and in my opinion the proper rule to be followed is that which was laid down by Lord Justice James in *Bell's case*.¹ I shall follow it on the present occasion, and direct the costs of all parties to be paid out of the estate.

Solicitors for the policy holder: Messrs. *Field, Roscoe & Co.*

Solicitors for the liquidator: Messrs. *Young, Maples & Co.*

¹ Law Rep. 9 Eq. 706.

IRELAND.

THOMAS WESTROPP *vs.* SAMUEL BRUCE, Secretary to the Commercial Insurance Company.

(Batty, 155. King's Bench, 1826.)

Age. Declarations. Waiver. — In an action on a policy of insurance upon the life of W. M., which contained a warranty that W. M. did not exceed the age of fifty-nine years, *held*, that after the death of W. M. his unsworn declarations as to his own age, made several years before the date of the policy, were not admissible in evidence in proof of his age.

The agent of the insurers, at the time of effecting the policy, having expressed himself satisfied as to the age of the life insured as represented to him, *held*, that this did not dispense with the necessity of proving the age as stated in the warranty.

ASSUMPSIT upon a policy of insurance, upon the life of one William Monsell. Plea, the general issue. At the trial before Baron Pennefather, at the last assizes of Limerick, it appeared that the policy was effected with the Commercial Insurance Company, on the 14th of November, 1823, for the sum of £800, on the life of William Monsell, who was thereby warranted by the plaintiff to be in good health, and not exceeding the age of fifty-nine years. William Monsell died on the 22d of November, 1824. The defence relied on by the insurance company was, that W. Monsell exceeded the age of fifty-nine, at the time the policy was effected, and that he was not an insurable life within the terms of the policy, a material circumstance, affecting his health, having been concealed from the company. In order to prove his age, the plaintiff produced a person who swore that W. Monsell, from ten to sixteen years ago, had often declared to him that he was born in March, 1765, which would make his age to be under fifty-nine years at the time of effecting the policy. On his cross-examination he stated that he and Monsell were disputing about their ages, and that Monsell wanted to show that the witness was fifteen years older than himself. Another witness also stated that he had heard Monsell declare that he was born in 1765. The defendants' counsel objected to evidence of the declarations of the deceased as to his age or the time of his birth; but the learned judge overruled the objection and admitted the evidence. It appeared also that one Wilson, the agent of the insurance company, had expressed himself satisfied with the representations made as to the age and

health of the life insured, at the time of effecting the policy; and evidence was gone into with respect to his health.¹ The learned judge left it to the jury to say whether Monsell was of the age specified; secondly, whether his life was insurable within the ordinary meaning of the word, which he had explained to them; thirdly, whether if he had a disorder tending to shorten life, the defendants were not apprised of it and acquiesced in it by their agent, Wilson, by whose acts they were to be bound. No objection was taken to the charge, and a verdict was found for the plaintiff. The learned judge in his report also stated that the case appeared to him extremely suspicious as to the state of Monsell's health. A conditional rule having been obtained for setting aside the verdict, as being against law and the weight of evidence, and on the ground of the admission of illegal evidence, the case was argued by

Blackburne & George Bennett, in support of the rule. There being two express warranties in the policy, that the insured was in good health, and that he did not exceed the age of fifty-nine years, it was incumbent on the plaintiff to establish those facts. When there is no warranty, the insurer takes the risk upon himself, unless there is a fraudulent misrepresentation or concealment.² Misrepresentation or concealment is material only where there is no express warranty; but where there is such a warranty the only inquiry is, whether the fact warranted is established. The conduct of Wilson, the agent, in expressing himself satisfied, could not have the effect of waiving the necessity of strict proof, as that would be inconsistent with the nature of the contract. With respect to the age of the insured, his declarations were not admissible in evidence. This is not like a case of pedigree, nor does it come within any of the exceptions of the general rule of law, against the admissibility of hearsay evidence. In *Roe d. Brune v. Rawlings*,³ Lord Ellenborough, alluding to the case of *Herbert v. Tuckal*,⁴ where a memorandum of a deceased father, as to the time when his child was born, was received as evidence to prove when the infant would come of age, says: "And yet the most that can be said for such evidence is, the peculiar means of

¹ It is deemed unnecessary to state that part of the evidence, or of the arguments which relates to the health of the insured, as the judgment of the court went solely on the other point. R&P.

² Marshall on Insurance, 775.

³ 7 East, 290.

⁴ Sir T. Raym. 84.

knowledge of the fact by the father, and the absence of all interest in him, at the time of the memorandum or declaration made, to falsify the truth in respect to it." The declarations of a party himself as to his own age are not entitled to the same credit. He has not the same peculiar means of knowledge ; on the contrary, it is impossible that he can know the fact except by hearing it from others. Even the declaration of a deceased father will not be admitted to prove the place of his child's birth. The *King v. The Inhabitants of Erith*,¹ which shows how strictly the rule is confined. *Outram v. Morewood*,² *The Berkeley Peerage case*.³ The evidence received in this case was therefore inadmissible, and when that is the case, the court will set aside the verdict, even when it is admitted that the verdict must be the same on another trial. *Doe d. Didsbury v. Thomas*.⁴

Goold, Sergt. & Jackson, contra. It would be going far to hold that a man's declarations as to his own age were no evidence, when uncontradicted by others' testimony. If the age of a person deceased appeared on his tombstone, that would be some evidence of the fact, and yet it would not be stronger than his express declaration as to it. So if the deceased had made an affidavit as to his age, at the time of effecting the policy, that would amount to some evidence ; and if so, why should not his parol declaration be also admissible ? It was a declaration made *ante litem motam*, and without any interest in the party to misrepresent the fact. Besides, the birth of the insured was a remote event, which occurred about sixty years ago, with respect to which no very satisfactory evidence could be expected ; and in such cases such strict evidence is not required as in modern transactions. The declarations of deceased persons who have had peculiar means of knowledge, made without interest, will be received. *Higham v. Ridgway*,⁵ *Roe d. Brune v. Rawlings*.⁶ At all events the conduct of Wilson dispenses with strictness of proof, he being the agent of the insurers, authorized to perfect the policy upon making such inquiries as he thought sufficient, and having expressed himself satisfied. If there was any evidence to go to a jury, the verdict will not be set aside upon the ground of some inadmissible evidence having been received, when no point has been saved,

¹ 8 East, 539.² 5 T. R. 121.³ 4 Camp. 414.⁴ 14 East, 323.⁵ 10 East, 109.⁶ 7 East, 290.

nor a case reserved ; but the court will endeavor to support it, if there was sufficient to authorize the finding of the jury. *Horford v. Wilson*.¹

BUSHE, C. J. This case comes before the court on showing cause against a conditional order obtained by the defendant to set aside the verdict for the plaintiff : 1st, on the ground of illegal evidence having been received ; 2dly, as being against law and evidence. As to the second ground, the learned judge, Baron Pennefather, has reported that in his opinion the case of the plaintiff was suspicious ; but it is only necessary to consider the first ground. The action was assumpsit on a policy of insurance, upon the life of one William Monsell. The defendant is secretary to the insurance company. The policy of insurance contained a warranty of the age of Monsell, namely, that he did not then exceed fifty-nine years. This fact was controverted by the defendants ; and the only evidence given as to that fact by the plaintiff was, that Mr. Monsell, the person whose life was insured, had in two conversations before the insurance was thought of, stated that he was born in 1765 ; which if true would make the representation accurate. The only question is, whether the evidence was admissible ; and we think it was not. It is in strictness an instance of hearsay evidence, consisting of the declaration of a person not sworn, as to a fact capable of direct proof ; and it does not fall within any of the exceptions to the rule ; not being a question of pedigree, or anything the evidence of which may consist of reputation. To such cases, generally speaking, the exception is confined strictly, as appears by *The King v. Inhabitants of Erith*.² The case of *Herbert v. Tuckal* ³ has decided that a declaration or entry in an almanac by a deceased person may be evidence, even in a case in which pedigree was not in question, viz., in order to prove the time of the birth of a testator, for the purpose of showing that he was under age when he made his will. But the person whose declaration was so admitted was the father of the deceased person ; and that decision rests upon the circumstance, that the father had peculiar means of knowing, of his own knowledge, the fact as to which he made the declaration ; as is stated by Lord Ellenborough in his judgment in *Roe d. Brune v. Rawlings*.⁴ But in the present

¹ 1 Taunt. 12.

² Sir T. Raym. 84.

³ 8 East, 539.

⁴ 7 East, 290.

Murphy v. Harris.

case the person whose evidence was admitted was one who could not possibly know of his own knowledge the fact as to which his declaration was admitted, viz., the time of his own birth. It was, however, argued that the declaration was admissible, as having been made *ante litem motam*. But that alone cannot make declarations evidence which *per se* are not so. If a declaration be from its nature admissible, its being made *post litem motam* may be an objection to it; but the time of making it cannot be the test of its being evidence. It was, however, argued by the plaintiff's counsel, that in this case that evidence was unnecessary, and that the verdict can be well sustained without it, because one Wilson, who was agent to the defendant, had made inquiries as to the age of the insured, and was satisfied with the result of them. But the answer given by Mr. Blackburne to that is satisfactory, viz., that this is a case in which the party insuring had warranted the age of the life insured; and therefore the question was not whether the insurer was satisfied with the representation made, or adopted it, but upon the fact of the age as warranted, — a distinction which, in this term, we considered and acted upon in the case of *Murphy v. Harris*, [*infra*.] The cause shown therefore against the conditional rule must be disallowed, without costs.

Rule absolute.

MURPHY *et al.*, executors of Martin Lewis, *vs.* HARRIS *et al.*

(Batty, 206. King's Bench, 1826.)

Misrepresentation concerning age. — Covenant upon a policy of insurance upon the life of M. L. reciting that M. L. had declared his age did not exceed forty-three years on a day named, and containing a proviso that if anything stated in such declaration should be untrue, then the policy should be null and void. The plaintiff averred that the age of M. L. did not exceed forty-three years on that day, upon which fact issue was joined. At the trial, there being conflicting evidence as to the age of M. L., and some evidence having been given that the agent of the insurers was satisfied with the representation made by him as to his age, and acquiesced in it, the judge left it to the jury to say, whether the age of M. L. exceeded forty-three years or not, or whether the insurers had adopted the age as given in by him, and acquiesced in it; and the jury found a verdict for the plaintiff, at the same time declaring that there was misrepresentation of the age, but not intentional; and that the insurers, by their agents, had adopted the age as given in and acquiesced in it. Upon motion to set aside this verdict for misdirection of the learned judge, *held*, that upon this finding, a verdict ought to have been directed for the defendants; and although they did not call for such a direction at the trial, and made no objection to the charge at that time, the defendants might move to set aside the verdict, upon payment of the costs of the trial, the jury having found in their favor the only fact in issue between the parties, viz., that the age of M. L. had been misrepresented by him.

COVENANT upon a policy of insurance effected with the European Life Insurance Company, by one Martin Lewis deceased, for the sum of £3,000 upon his own life. The declaration contained one count which stated the execution of the policy by the defendants, which policy contained a recital that the said Martin Lewis had, among other things, declared that his age did not exceed forty-three years on the 25th of August, 1821, to the truth of which he had subscribed his attestation; and also recited a proviso therein, that if anything stated in his said declaration and attestation should be untrue, then the policy should be null and void. The declaration contained an averment that Martin Lewis did not exceed the age of forty-three years upon that day. The defendants pleaded: 1st, *non est factum*; 2dly, that Martin Lewis exceeded the age of forty-three years on the 25th of March, 1821; by reason whereof the policy was null and void. The 3d plea was to the same effect; and upon these pleas issue was joined. At the trial before Pennefather, B., at the last summer assizes for Cork, it appeared that Martin Lewis died on the 27th of June, 1824, and that this action was brought by his executors for the benefit of a Mr. Hargrave, on whose account the policy was effected, and who had also, in the year 1820, effected a policy of insurance on the life of Martin Lewis. The plaintiffs called several witnesses to show that Martin Lewis was not above the age of forty-three at the time stated in the policy. The defendants then went into evidence to show that he was of a greater age, but upon this point the testimony of several of his family was conflicting. The defendant, also, to prove Lewis's written declaration as to his age, produced a person, who, upon his cross-examination, stated that he was joint-agent of the defendants with another person; that he did not examine Martin Lewis as to his age, further than by asking him his age and the other questions inserted in a printed form; that he (the witness) was satisfied as to his age, and recollected the insurance made by Mr. Hargrave, the year before, when Lewis answered the same questions. The witness further stated that his father was well acquainted with Lewis, and that there was an entry in the witness's books, that Lewis had no interest in concealing his age. A letter was also produced, which was written by the agent, after the death of Lewis, to the secretary of the company, stating that Lewis had no interest in the insurance, and that he (the agent)

was sure that there had been no intentional misrepresentation of his age. The learned judge left it to the jury to say, whether the age of Martin Lewis exceeded forty-three years at the time of effecting the policy, or not; or whether the defendants had adopted the age as given in by him, and acquiesced in it. No objection was made to this charge at the time, and the jury found a verdict for the plaintiffs for £3,000 damages, and 6*d.* costs; whereupon the learned judge, being desirous of knowing the grounds of the verdict, desired the jury to inform him whether it was found on the fact that the age was correctly stated by Lewis, or on the ground which he had left to them, that the defendants had adopted the age as given in, and acquiesced in it. They then declared that they were of opinion that there was misrepresentation of the age, but not intentional; and that the defendants, by their agents, having adopted the age given in, and acquiesced in it, precluded themselves from questioning it. A conditional rule having been obtained upon a former day for setting aside this verdict as being contrary to law and evidence, and for the misdirection of the learned judge, and that a verdict should be entered for the defendants, inasmuch as the only issue in controversy between the parties (namely, as to the age of Lewis exceeding forty-three years) had been found for the defendants, the case was now argued by

Goold, Sergt. & *Townshend*, for the defendants. The issue for the jury upon the pleadings was whether Martin Lewis was more than forty-three years old on the day stated in the policy. There was no issue as to the adoption by the defendants of the age stated by him; but it was expressly provided by the policy, that if his declaration, as to his age, was untrue, the policy should be void. The jury found that the declaration was not true, so that the defendants were entitled to a verdict; and the verdict for the plaintiff has no legal evidence to support it. It may be contended that the judge's report states that he does not recollect any objection taken to his charge; but it appears, from his having asked the jury the grounds of their verdict, that his mind was impressed with such an objection. The authority of the agent of the insurers was limited, and he had no power to bind his principals by any such contract of adoption. Besides, the premium would have been increased had the true age been stated. It is true that an objection must be taken at the trial, in cases

where the objection could be answered in evidence, or be otherwise obviated, if made in time; but that could not have been done here. Besides, there may be cases where the charge of the judge may at first appear to the counsel to be well founded, and yet may afterwards, upon consideration, turn out to be erroneous, and in such cases it would be hard to preclude the party from ever after taking any objection to it.

G. Bennett & J. Smith, contra. There was evidence to go to the jury to support the view of the case taken by the learned judge. The age of the party was a controverted point; some members of his family gave evidence in support of his declaration, which was met by evidence to which the jury attached greater weight, but they found that there was no intentional misrepresentation. Under such circumstances, the evidence of the agent, and the letter written by him, would show that he, on behalf of the insurers, had adopted the age stated. [BURTON, J. The evidence appears to amount to no more than that the agent believed the representation to be true.] The conduct of the agent in expressing himself satisfied as to the age, put the party off his guard. It dispensed with the strict proof of the fact, and is sufficient to justify the jury in the construction they have put upon it, that the age of the party was a fact acquiesced in, and not to be disputed; especially as the person making the representation was not interested in the policy. If the agent was aware of the fact at the time, even although there had been no express acquiescence, it would be a fraud in him; and the principals would be affected by it, so as to conclude them from disputing the fact. 2dly. No objection was taken at the time to the judge's charge, and it is too late to make it. Even when there is a clear objection, if the party does not avail himself of it at the trial, no advantage can afterwards be taken of it. The case of *Watson v. Sutton*¹ affords a strong instance how imperative this rule is, even when it operates against the justice of the case. So also *Andrews v. Linton*.²

BUSHE, C. J. The court are of opinion that the verdict must be set aside upon payment of costs. If it were not for the difficulty that the objection was not made at the trial, we should not have required the defendants to pay the costs. The verdict is

¹ 1 Salk. 272.

² 2 L. Raym. 884.

against law, inasmuch as the jury have found it on an issue that was not before them. It is against evidence, because the jury believed the fact to be contrary to that which their finding has established. It is also against the justice of the case, because there appears to have been a misrepresentation of the party's age, in consequence of which the premium demanded was smaller than it would otherwise have been. But the question is, whether the party, not having called on the judge at the time to alter his charge, shall now be allowed to complain of it. This case, however, appears to be distinguishable from ordinary cases. In general, the reason of requiring the objection to be made at the time is to give the judge an opportunity of correcting his charge, and leaving the proper question to the jury. But here, the moment his attention should be called to the objection, his duty would be instantly to direct a verdict contrary to that before found by the jury; and he would say to them: "I was wrong in directing you to consider whether the defendants had adopted the age given in by the party; and you have already given your opinion upon the other point, that there was a misrepresentation as to his age; therefore you are bound to find a verdict for the defendants." In this case, then, the calling of the judge's attention to the point now relied on, could not have put him upon leaving a question to the jury; there was no choice, nor was there any question to leave, after the jury had declared their opinion that the age was misrepresented. When the jury pronounced that opinion, the defendant's counsel ought to have called for a verdict. But their omission to do so cannot influence us farther than as to the costs. To that extent it influences us, for the plaintiff is not to suffer by their mistake. If the jury had not assigned the reasons of their finding, it would be hard to impeach the verdict. But as they have declared their reasons, there is sufficient ground for the defendants to sustain their application.

Verdict set aside upon payment of the costs of the trial. No costs of the motion.

Abbott v. Howard.

ABBOTT, administratrix, *vs.* HOWARD, a member of the Alliance British and Foreign Life and Fire Insurance Co.

(Hayes, 381. Exchequer, 1832.)

Concealment. Materiality. — A policy of life insurance is vitiated by not communicating all material facts to the company at the time of the contract made, and it is immaterial whether such facts have been withheld by fraudulent design or innocent omission. It is the duty of the judge at *nisi prius* to submit to the jury the question of the materiality of a fact withheld from the assurers. Smith, B., *dissentiente*.

ASSUMPSIT on a policy of insurance, effected on his own life, by William Abbott deceased, for the sum of £1,000. The declaration stated that, in the lifetime of W. Abbott, to wit, on the 10th of December, 1825, at, &c., the said W. Abbott caused to be made a certain policy of assurance; whereby, after reciting his proposal to effect an insurance with the company upon his own life, and that he had delivered at the office of the company a statement in writing signed by himself; and thereby declared, among other things, that his age did not exceed fifty-four years, that he had had the small-pox, that he was not then, nor ever had been afflicted with gout, rupture, fits, asthma, spitting of blood, or any disorder which tends to shorten life; and had agreed that such declaration should be the basis of the contract between the assured and the company. It was witnessed in the usual form that if the assured should pay the annual premiums, the company would, within three months after his death, pay to his executors, administrators, or assigns, the said sum of £1,000. Provided always, that in case any untrue or fraudulent allegation were contained in the declaration delivered at the office of the company, or in case the assured should go beyond the limits of Europe, &c., the policy should be void; and all moneys, paid in respect thereof should be forfeited to the company. That thereupon, afterwards, to wit, on, &c., at, &c., aforesaid, in consideration that W. Abbott, in his lifetime, at the request of the said company, had theretofore, to wit, on, &c., aforesaid, paid the sum of, &c., as a premium for the assurance of £1,000, upon the life of the said W. Abbott, until the 25th of December, 1826, and had then and there undertaken and promised the said company to perform and fulfil all things in the said policy contained, on the behalf of the assured, to be performed and fulfilled; they, the said company, undertook, &c., the said W. Abbott in his lifetime, that

they would become and be assurers to the said W. Abbott of the said sum of £1,000 upon the premises aforesaid; and would perform and fulfil all things in the said policy contained on their part and behalf as such assurers, to be performed and fulfilled. That the declaration, in the said policy mentioned to have been delivered by W. Abbott, was, at the time of the making and delivery thereof, in all respects true. That W. Abbott did, before the 25th of December, in each and every succeeding year during his life, pay, at the office of the company, the premium of £57 0s. 10d. respectively, for each and every of such years. That after the making of the said policy, and of the said promise and undertaking, to wit, on the 4th of November, 1828, W. Abbott died. That the death of W. Abbott was afterwards duly certified to the company. That W. Abbott, in his lifetime, conformed to all the conditions of the policy. That although he did so, and although three months had elapsed after proof of his death, of all which the company had notice, yet they, not regarding, &c., had not nor would, though requested to do so, pay the said sum of £1,000 to the plaintiff, administratrix as aforesaid, but had wholly, &c., to wit, at, &c., aforesaid. Plea, the general issue.

The trial took place before Smith, B., at the sittings after Michaelmas term, 1829, when a verdict was found for the plaintiff. A bill of exceptions was taken to the charge of the learned baron, on behalf of the defendant. The evidence given on both sides, together with the learned judge's charge, was set out on the bill of exceptions. The following parts appear to be most material.

About the latter end of July, 1823, Doctor Stoker was, for the first time, called upon professionally to attend W. Abbott, he being at the time attacked with "an irritative fever, in which all the functions were equally engaged." Doctor Stoker continued his attendance from that time till the 29th of December, 1823, when he ceased visiting his patient, conceiving him to be in a fair way of recovery. During his attendance, however, an anthrax formed on the lower part of Abbott's back, a little above the *os sacrum*. It was operated on by Surgeon Colles, and disappeared at the same time with the fever. In January, 1824, Doctor Stoker was again called in, by a return of the same fever, and continued his attendance until August in that year. During this period a tumor formed on W. Abbott's back, under the left scapula, extending to the *os sacrum*. Soon after its appearance,

Mr. Colles was again sent for. At that time the tumor was about the size of an orange; but it gradually increased, till at length it almost attained the size of a man's head. Towards the end of 1824, Doctor Dempster, a military physician and surgeon, being then in attendance upon him, recommended the opening of the tumor. This, however, was deferred till the month of April, 1825. A few days before the operation, potash was applied to it by Mr. Colles, with the concurrence of the surgeon general, Mr. Crampton, who was also called in. Mr. Colles being afterwards confined by illness, the tumor was opened with a lancet, by the surgeon general, assisted by Mr. Cusack. About a basin full of wheyey and curdy matter was discharged, and the patient got speedy relief.

From the commencement, Mr. Colles considered the tumor, from its indolence, to be of a scrofulous nature. In this he was joined by Doctor Stoker, who, at that time, was confirmed in the opinion by having observed certain symptoms on one of Abbott's children. At the trial, however, Doctor Stoker alleged that he had afterwards changed his opinion, upon an examination of the seat of the tumor, in November, 1825, when he first saw it since the commencement of that year. He then found it perfectly free from cicatrix. He believed both this tumor and the anthrax to be in their nature critical. His now opinion was strengthened by the evidence of some members of Abbott's family, given on the trial of another action on a policy of assurance on the same life, in which they deposed that the family never had been afflicted with scrofula. He attributed the peculiar character of the discharge to the operation of digitalis, which had been frequently administered. The surgeon general, Mr. Colles, and Mr. Cusack, were all strongly of opinion — as well from the appearance of the discharge, as from the indolence of the tumor — that it was chronic, and of a scrofulous nature; that its appearance indicated a debilitated and broken down constitution; and that the greatest danger was to have been apprehended from the operation, lest the patient should sink under it. They conceived that he was also laboring under some pulmonary disease, which increased the peril of the operation, and that both these circumstances were in their opinion most material, and ought to have been communicated to the company before effecting the insurance.

Doctor Dempster was decidedly of opinion that the tumor

was not chronic or scrofulous, but critical, and the result of the fever under which he had formerly labored. He had therefore recommended the opening of it full five months before, as likely to relieve the fever. He continued to attend and dress the wound, almost every day after the operation, till the 11th of May. Being then obliged to leave town, he did not see Abbott until the beginning of July, when he found him in good health, attending his business. Surgeon Wilkinson, of Parsonstown, had seen W. Abbott shortly before, and during some months after, the operation. He also advised the operation, believing that the symptomatic fever under which Abbott was laboring had been generated by the tumor. He believed that Abbott was not of a scrofulous habit, and that in November, 1825, he was a perfectly insurable life.

In October, 1825, the deceased being anxious to insure his life, applied to Doctor Dempster for a certificate, which was given by him in the following form: "Nenagh, 5th of October, 1825. I hereby certify that I have from time to time attended Mr. W. Abbott, of Baggot Street, Dublin, professionally, both in Dublin and the country. He had, latterly, a very severe fever; after recovering from which, a large abscess formed on his back, from which he is now free. And in consequence of said fever and abscess, he was greatly reduced: but from the present state of his health, I do consider him an insurable life. James Dempster, M.D., Surgeon." No use was ever made of this document, which was discovered among Abbott's papers, after his decease. In November, 1825, Abbott applied at the office of the company, in order to effect the insurance in question. He referred them to Doctor Stoker as his medical attendant, and was required to attend Surgeon Stokes, the medical officer of the company, for examination as to his state of health, with a view to obtaining the necessary certificate. The usual circular was sent to Doctor Stoker, inclosing a list of queries for the purpose, as it was said, of ascertaining his general state of health. On the 25th of November, he returned them with his answers annexed. They were to the following purport: That he had known Abbott more than twenty years; that he had not lately been in the habit of seeing him frequently, or associating with him; that he had last seen him on the 21st of November, then instant; that he was then in good health, and, to his belief,

so continued to be. Q. "Has he, to your knowledge or belief, been afflicted with gout, fits, asthma, hernia, or any other disorder which has a tendency to shorten life?" A. "He had fever in the year 1823, from which he recovered, and has no disease which can tend to shorten his life, in my opinion." That his habits were active and temperate; and that he was not acquainted with any reason why an assurance on his life would be more than usually hazardous. This document was signed by Doctor Stoker, but the answers were not filled up by him, nor could he tell by whom they were written.

At the interview with Mr. Stokes, W. Abbott denied his being afflicted with scrofula, or with any disease tending to shorten human life. He declared that he was never ill, except in 1823, when he had the common fever of the city, and was not a day ill before or since. The anthrax was mentioned as the termination of a common low fever; but nothing was said of the tumor or of the fever with which it was accompanied. A merchant who accompanied him observed to Mr. Stokes that the deceased was to his knowledge as wiry and healthy a little fellow as any in the kingdom, although his appearance was against him. Mr. Stokes being satisfied with these representations, merely examined the front of his person, but did not look at his back. The following certificate was given: "Dublin, November 25th, 1825. Mr. William Abbott, Attorney, of Baggot Street, came before me; and, having minutely examined him, I think him free from constitutional or organic disease. The company are safe, in my opinion, in receiving him for insurance. John Stokes." This certificate Mr. Stokes declared in evidence would not have been given had he been aware of the real state of Abbott's health from 1823 to 1825.

The company being satisfied as to the insurableness of the life, the policy was underwritten on the 10th of December, 1825. W. Abbott died on the 4th of November, 1828. Doctor Stoker was then in attendance upon him, having been called in three days previous. He could not tell of what disease Abbott died.

The learned baron, in his charge, left it to the jury to say whether, in not referring to Doctor Dempster, in addition to Doctor Stoker, the assured was, with intentional deceit, withholding from the company a disclosure which he knew that Dempster would have been disposed to make, and which he

thought might have been material for the company to hear. He told the jury, that if they believed scrofula to be a disease which tends, at an advanced period, to shorten human life; if they believed Abbott to have been scrofulous in April, 1825, and that that disease, or some consumptive or other mortal consequence of it, existed in November of that year, then there was an end of the case, and the verdict must be for the defendant; for that, by not answering truly—that is, according to the fact—all the questions proposed, one of which was, whether the assured labored under any disease tending to shorten human life, his part of the contract would not have been fulfilled, and he would forfeit his right of calling on the insurance company to perform theirs. “To this extent,” proceeded the learned baron, “and within these limits, I conceive that the insured answers at his peril; that he is responsible for the truth of his answers; and that if they be actually false, though they should be morally true, the foundation of such an action as the present would be taken from under him. For, in fact and substance, these questions specify the terms on which the company contracts. And to enforce the agreement, without adhering to those terms which form a part of it, would be, upon the ostensible grounds of an alleged agreement, to enforce what was not that agreement; and would be contrary to all reason, law, and justice. But if we consider the questions as constituting, we should also consider them as defining and limiting those terms. Suppose the life appears to have been insurable; suppose all the questions put by the company truly answered; suppose the absence of all intentional suppression or misrepresentation of everything like covin, fraud, or *mala fides*; in such a case it does not seem to me that the innocent omission to mention facts not within the range of the questions proposed ought to avoid the contract. For we have declined to alter the terms for the plaintiff, and we ought equally to decline altering them for the benefit of the defendant. Observe that I am here, for argument’s sake, assuming that the life was insurable; the party laboring under no disease tending to shorten human life; therefore, *ex hypothesi*, the company has not been injured; they have but insured what was insurable. Again, the assured, in truly answering all their questions, has, in other words, complied with all their terms. Why should he not, if his life were insurable, and he have acted honestly, have the benefit of that

contract, of which his part has been fulfilled? But I have been hitherto supposing you to think, what very possibly you may think, that here there was no fraud. What must have been the fraud intended (if any)? To impose an insurable [uninsurable?] life on the company as an insurable one. If such an object were, however innocently, accomplished — if the life of W. Abbott was not insurable — there is, as I conceive, no complication in the case. You will find at once, on this ground, for the defendant.”

To this charge the counsel for the defendants took several exceptions; of which the one principally relied on in argument was, that the learned judge should have told the jury, that if they believed that the fever of 1824, and its being accompanied by the tumor or abscess on the back, and that tumor's having been operated on in April, 1825, were circumstances necessary or material to have been communicated by the late W. Abbott to the insurers, to enable them to form a just estimate of the risk, the omission of them vitiated the policy, and the jury should find for the defendants. The learned baron gave it as his opinion that they ought not to be so directed.

Hatchell, for defendants. The statement that the insured had never been afflicted with any disease tending to shorten life, amounts to a warranty that everything which it was material for the company to be informed of, before effecting the insurance, was communicated to them. Now, it appears by the evidence of one of the plaintiff's witnesses, Doctor Dempster, that he considered the fact of W. Abbott's having been afflicted with fever and anthrax most material, and that they ought to have been communicated to the insurers. If the information were material, the suppression of it avoids the policy, whether such suppression arose from culpable fraud, or mere negligence. It was the duty of the judge to have submitted the question of materiality to the jury. *Carter v. Boehm*,¹ *Fitzherbert v. Mather*,² *Hull v. Cooper*,³ *Huguenin v. Rayley*,⁴ *Bufe v. Turner*,⁵ *Morrison v. Muspratt*,⁶ *Maynard v. Rhodes*,⁷ *Lindenau v. Desborough*,⁸ *Rickards v. Murdock*.⁹

T. B. C. Smith & Perrin, contra. It is a general rule that,

¹ 3 Burr. 1905.

⁴ 6 Taunt. 186.

⁷ 5 Dow. & Ry. 266.

² 1 T. R. 12.

⁵ 6 Taunt. 338.

⁸ 8 B. & Cr. 586.

³ 14 East, 479.

⁶ 4 Bingham, 60.

⁹ 10 B. & Cr. 527.

in construing written contracts, parol representations cannot be called in aid, except to show the existence of fraud in making the contract. The parties are bound by the terms of the contract, and by them alone. *Pickering v. Dowson*,¹ *Kain v. Old*.² Policies of assurance are subject to the same rules of construction as all other written contracts. *Robertson v. French*,³ *Flinn v. Tobin*.⁴ The language of policies is to be understood in its plain and ordinary sense. Thus, when it is said that W. Abbott had no disease tending to shorten life, it must be meant that he had never been afflicted with any chronic complaint, which, at the time of effecting the insurance, tended to shorten life, and, of course, increase the risk of the company. There is also a material distinction between policies effected on warranty and upon representation. In the latter, a substantial compliance is sufficient; and upon them alone can the question arise, as to the materiality of information withheld; while in the former, the terms of the contract must be strictly complied with, by the insured; and upon such compliance depends the validity of the policy. *Pawson v. Watson*,⁵ *Ross v. Bradshaw*.⁶ In the present case the insurance was upon an express warranty that the life was insurable. No information that was demanded has been withheld. The jury have negatived all fraud in the transaction. Questions prepared by the defendants themselves have been fully and fairly answered; and those answers afterwards formed the basis of the contract between the parties. Though the warranty may have been satisfied; though the life may have been insurable, and free from all diseases tending to shorten life; yet it is argued that, because a fact — which has occurred long antecedent, totally unconnected with the subsequent death of the assured, and never particularly inquired after by the company — was, by an innocent omission, not communicated to them at the time of effecting the insurance, they shall now have it in their power to evade compliance with their part of the contract. In *Haywood v. Rodgers*,⁷ the policy was effected on an implied warranty that the ship was seaworthy. It was afterwards sought to set aside the policy, on the ground that a material circumstance — viz., the ship's having undergone a survey at Trinidad, on account of her bad character — was

¹ 4 Taunt. 779.² 2 B. & Cr. 627; 4 Dow. & Ry. 52.³ 4 East, 130.⁴ Moo. & Mal. 367.⁵ 2 Cowp. 785.⁶ 1 W. Bl. 312; 2 Marsh. Ins. 793.⁷ 4 East, 590.

withheld ; but the court discharged the rule for setting aside a verdict for the plaintiff. So, *Everett v. Desborough*¹ was the case of a policy effected with the Atlas Company, which has its conditions of assurance indorsed on the policy ; and, by a provision in the policy, are virtually incorporated with it, and form the basis of the contract. One of those conditions was, that there should be a reference to the usual medical attendant. The reference given was false, and it being an insurance on warranty, the policy, of course, was vitiated. *Lindenau v. Desborough*² was the case of another policy effected with the same company. There, also, the policy was effected on a warranty ; and the declaration contained an averment of compliance with all the terms of the contract on the part of the assured.³ But that averment was disproved, by its being shown at the trial that the Duke of Saxe Gotha was not an insurable life, and that he afterwards died of the malady with which he was afflicted at the time of the insurance. In *Bufe v. Turner*,⁴ which was cited to show that a policy may be avoided by a concealment without fraud, there was a clear non-compliance with the conditions of the policy. By them, it was required that the situation and circumstances of the buildings should be truly stated, so that they might not be charged at a lower premium than was set out in the proposals. The plaintiff concealed the fact of the fire having taken place in the boat builder's establishment adjoining, and the consequent hazard to his own concern. *Rickards v. Murdock*⁵ was the case of a policy on representation, in which there was wilful suppression of a material fact.

Holmes, in reply. It is the universal rule of law, that where two parties, in making a contract, do not stand on equal terms, — that is, where one party is acquainted with material facts, which are not communicated by him to the other, — the contract made under such circumstances shall not be enforced ; *Gordon v. Gordon*,⁶ *Salkeld v. Vernon*,⁷ *Leonard v. Leonard* ;⁸ and that, whether the suppression of such material facts may have been wilful, and so attributable to moral fraud, or have arisen from in-

¹ 5 Bingham 503 ; *ante*, vol. 2, p. 226.

² 8 B. & Cr. 586 ; *ante*, vol. 2, p. 216.

³ This fact appeared by reference to the papers in the cause, which were procured from London.

⁴ 6 Taunt. 338.

⁵ 10 B. & Cr. 527.

⁶ 3 Swanst. 400.

⁷ 1 Eden, 64.

⁸ 2 Ball. & B. 171.

nocent omission, and thus to be classed as a legal fraud. 2 Wms. Saunders, 220, a. In both cases, the consequence to the party uninformed is the same. The law presumes fraud in the party not giving the information; and the written contract, though not afterwards to be varied by the introduction of a new term by parol, is wholly annulled for the fraud. The distinctions which have been taken between policies effected on warranty and on representation do not apply. Fraud in not communicating a material fact equally vitiates both. *Carter v. Boehm*,¹ *MacDowall v. Fraser*,² *Shirley v. Wilkinson*,³ *Fitzherbert v. Mather*,⁴ *Lynch v. Hamilton*,⁵ *Bridges v. Hunter*.⁶ It has been attempted, on the other side, to weaken the force of *Lindenau v. Desborough*; ⁷ but that case was decided on the broad principle that facts were not communicated which might have been material. So in *Bufe v. Turner*,⁸ the description required by the condition of the policy was not intended to include every collateral circumstance which would be material, and yet, for the withholding such a circumstance, the policy was defeated. *Haywood v. Rodgers*,⁹ has been cited to show that when the policy contains a warranty, it is unnecessary to detail all the peculiar circumstances of the case. Chamber, J., however, who tried the case, thought that, for want of information as to the survey at Trinidad, the parties did not deal on an equal footing, and that the verdict should have been for the defendants. Although the court above upheld the verdict, it was not decided that the insurer could not show, *dehors* the contract, certain material circumstances, which were known to the one party and not to the other. If Lord Ellenborough meant to convey that opinion, he is contradicted by himself, in the subsequent case of *Bridges v. Hunter*. As to *Flinn v. Tobin*,¹⁰ the misrepresentation was not of a fact which had actually taken place, but of one which was expected, viz., the quantity of rock salt which the vessel was to carry. If the underwriter had thought the quantity of importance, he ought to have insisted on its being specified in the policy. *Cur. adv. vult.*

JOY, C. B. This case comes before the court upon exceptions to the learned judge's charge, one or two of which are most ma-

¹ 3 Burr. 1905.² Dougl. 260.³ Dougl. 306, n.⁴ 1 T. R. 12.⁵ 3 Taunt. 37.⁶ 1 M. & S. 15.⁷ 8 B. & Cr. 580.⁸ 6 Taunt. 338.⁹ 4 East, 590.¹⁰ Moo. & Mal. 367.

terial ; and to them accordingly I shall particularly apply myself. With a view, however, to a right understanding of them, it will be necessary briefly to mention the facts.

Previously to the year 1823, Doctors Cheyne and Barker had been in the habit of occasionally visiting the deceased, William Abbott. But in that year, he having had a severe attack of fever, Doctor Stoker was called in as medical attendant. How long the fever lasted is uncertain, but we learn that Stoker continued his attendance from July until December, 1823 ; at which time, Stoker tells us, W. Abbott was recovering, but had not completely recovered. In the course of that illness, an anthrax appeared, which is a boil of a very peculiar and highly inflammatory nature. It was operated on by Mr. Colles, and a cure was effected. In January, 1824, Abbott was again attacked by fever, and Stoker was again called in. His attendance continued until August, 1824. During that time a second tumor arose, near where the anthrax had been. It has been described as an indolent tumor, and as large as a man's head. That was not operated on till April, 1825. In November, 1825, the certificate was given by Mr. Stoker, who had not seen Abbott since August in the preceding year ; at least, there is no evidence before us of his having seen him. The anthrax, as I have said, was operated on by Colles. He and the surgeon general, Mr. Crampton, both operated on the tumor at different times, — the former with caustic, and the latter with the lancet, — and both, together with Mr. Cusack, who was also called in, agree in describing it as a scrofulous tumor. Stoker says that he at first concurred in that opinion, and was confirmed in it by having observed scrofulous appearances on one of W. Abbott's children. When the certificate, however, was demanded of him, in November, 1825, he tells us that he examined Abbott's back, where the tumor had been, and began to doubt the correctness of his former opinion. Doctor Dempster was intimate with W. Abbott, and had attended him professionally. He had seen him five months before the tumor was operated on, and had recommended the operation. He attended during its performance, and afterwards, when he dressed the wound. He saw him in October, when he was applied to for a certificate.

Now it is in evidence here that the company required a certificate from the medical attendants, before effecting the insurance ;

and all the cases go to show that such certificate ought to be given by the last medical attendant. As between these two gentlemen, Doctors Stoker and Dempster, it is natural to believe that Doctor Dempster, who had been in attendance after the operation on the very dangerous tumor I have mentioned, should have been better qualified to judge of the general state of Abbott's health than Stoker, who had not seen him for many months before. Abbott himself seems to have thought so; for we find that he first applied to Dempster for a certificate, which was accordingly given him. That certificate, however, did not satisfy Abbott. He did not produce it to the company, but applied to Stoker. Let us look at the answers which Stoker gave to the questions put by the company, and to his evidence on the trial. If I understand the latter correctly, it amounts to this: the answers were brought to him, ready filled up, for his signature. They were not written by him, and he would not swear that they were not written by Abbott, the merchant, who had himself an insurance on the life of the deceased. He is asked, "Has he to your knowledge been afflicted with gout, fits, asthma, hernia, or any other disorder which has a tendency to shorten life?" The question is not "is he afflicted?" but "has he been afflicted?" To this he replies, "He had fever in 1823, from which he recovered, and has no disease which can tend to shorten his life, in my opinion." He cautiously restricts his reply to the then present time, and does not venture to say that he has not been afflicted with disease of the kind inquired after. No mention is made of the anthrax, nor of the second fever, nor of the tumor which followed it. It is merely said that he had a fever in 1823. Then comes the question as to the general hazard. The answer is, "None." It is difficult for a man who had attended W. Abbott, under the circumstances I have mentioned, not to know and believe that his life was more than usually hazardous. Look, also, to what occurred at the interview with Mr. Stokes. W. Abbott, the merchant, the friend of the assured, and who was present during the interview, tells the medical officer of the company that, to his knowledge, the deceased was as wiry and healthy a little fellow as any in the kingdom. Nor does this very bold assertion meet with the slightest contradiction from the assured. The officer makes favorable report on misrepresentations; the insurance is effected, and W. Abbott dies in three years after.

The question is, then, has this insurance company been fairly dealt with? and has no fact been withheld from them which they were entitled to know? If it be the law that they ought to have been informed of every material fact, is it not difficult to believe that the tumor was not a material fact? But I think the law to be this: as to the facts and circumstances not provided for by the written instrument, they may or may not be material; but if they be material, they ought to be communicated to the company. It is the province of the jury to pronounce upon this materiality, and of the judges to submit that question to them. The medical men, Crampton, Colles, Cusack, and Dempster, have sworn that they believed it to be a most important fact. Crampton and Cusack say that the nature of the tumor made it important, and that in its probable consequences it was dangerous. Colles and Crampton felt apprehensive about performing an operation on it, fearing the death of the patient in the course of it, as they say that the appearance of the tumor betokened a debilitated constitution. Assuredly, if the company were entitled to know anything beyond the precise words of the policy, they were entitled to know that. I find it laid down by a celebrated medical writer, that there are two species of abscess, acute and indolent; and the latter is said to occur chiefly in debilitated constitutions, as the surgeon general has described. Putting, then, all considerations of scrofula out of the case, the tumor was of such a nature as to indicate his constitution. And if so, can any one doubt that the company ought to have had information respecting a fact so very material. And the materiality of the fact is not to depend upon the opinion of a single witness, but is to be pronounced upon by the jury, on the whole of the evidence before them, after the question has been submitted to them by the judge.

I shall now proceed to mention a few cases; and shall select the decisions of different judges, — the rather, as the names of judges have been much pressed on us by the plaintiff's counsel. In *Lynch v. Dunsford*,¹ the information withheld from the company proved to be totally unfounded; and yet Lord Ellenborough says: "With the knowledge of such a fact kept back from them, can they be said to have contracted under equal terms? If the underwriters had had the knowledge possessed by the

¹ 14 East, 494, 497.

assured, it might have been a question with them whether they would have insured at all ; or if they did, whether they would not have required an enhanced premium." It has been argued here that the parties are bound by the terms of the policy, that they cannot travel out of them, and that a written contract cannot be varied by any matter *dehors* it. But Mr. Holmes has, in the course of his very able argument, satisfactorily answered that. The defendants, he has argued, seek not to vary, but to annul, the contract ; on the ground that, by this fraudulent concealment, it would be inequitable to enforce it. *Durrell v. Bederley*¹ was the case of a policy effected on a ship, furnished with letters of marque as a privateer. After her departure on her cruise, and before the insurance was effected, there were various rumors abroad in the island of Jersey, about a capture that had been made by the French, and a ship's binnacle, with a compass in it, had been seen afloat. Assuredly, the policy never stipulated for the communication of those rumors ; yet hear what is said by Lord Chief Justice Gibbs : " Loose rumors, which have gathered together, no one knows how, need not be communicated. Intelligence, properly so called, and as it is understood by mercantile men, ought to be disclosed when known. The materiality of the facts known and suppressed are for the decision of the jury. If the concealment be of a material fact, whether a rumor, report, or an article of intelligence, it ought to be communicated ; if immaterial, it may be withholden."

But there is a case which leaves no doubt on my mind that the court does often travel out of the instrument itself, and holds certain facts necessary to be communicated, which do not appear, in any way, on the face of the instrument. I allude to *Huguenin v. Rayley*.² That was the case of a policy effected on the life of a person who was in prison. The fact of her being in custody was suppressed. The court say,—and I read the judgment, because that part of the case appears to have been altogether sunk by the plaintiff's counsel : " That there was nothing express in the terms of the policy which required the imprisonment to be stated ; nor was there an omission of the statement of any matter which the office called for ; nevertheless, if the imprisonment were a material fact, the keeping it back would be fatal ; but it ought

¹ Holt, N. P. C. 283.

² 6 Taunt. 186.

 Abbott v. Howard.

to have been submitted to the jury, whether the omission of the fact relied on was or was not a material omission." That case shows, as clear as light, that although the party did not omit to answer anything to which he was interrogated, yet, if anything material were in his knowledge, and not communicated, the suppression would be fatal. It shows, also, that the materiality is to be left to the jury. *Morrison v. Muspratt* contains a confirmation of the same doctrine. There the medical man, like Doctor Stoker, had not seen the life for several months before the policy was effected; and another medical man had been in attendance in the mean time. Best, C. J., says: "Whether or not it was material for the defendants to have been made acquainted with the fact, which has been withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material; because all insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured." So also in *Lindenau v. Desborough*,¹ Bayley, J., says: "I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material; and not, whether the party believed it to be so." But it is said that there is a case at *nisi prius*, which contains an opinion of Lord Tenterden the other way, viz., the case of *Flinn v. Tobin*.² I have looked into that case, and have come to the same conclusion respecting it as Mr. Holmes. The underwriter, if he conceived the *expectations* to have been material, might have had them embodied in the contract. By neglecting to do so, he admitted their immateriality. Confining the observations of Lord Tenterden to the case immediately before him, they are correct. But if we consider him as laying down general propositions, he is contradicted by the authorities, and even by himself, in another case.³

Upon the authority of the cases I have cited, I am of opinion that the learned judge, in declining to submit to the jury the question of the materiality of the fact withheld, fell into an error—a natural error, I admit, and one which Lord Tenterden himself committed; for, in *Lindenau v. Desborough*, he admits

¹ 8 B. & Cr. 586, 592.

² Moo. & Mal. 368.

³ *Lindenau v. Desborough*.

that, on the trial of *Morrison v. Muspratt*, he had not called the attention of the jury to the materiality of the facts withheld. In this case, I am obliged to differ from my brother Smith, and entertaining a different opinion, I am also obliged to express it.

SMITH, B. I am, in this case, for the first time obliged to differ from my lord chief baron. I hope it may be for the last; and expect, at least, that such difference will be of rare occurrence. It has been a source of pride as well as pleasure to me, to find myself not only coinciding in the ultimate judgment of his lordship, but arriving at the same conclusions, as it were, by the same road. A case which came lately before the court afforded an instance how completely we agreed; and what a mere and absolute coincidence that agreement was, not preceded by communications from his lordship to me, or from me to him. I now differ from him, and from my brother Foster, with great and unaffected respect for their opinions, and with proportional diffidence and self-distrust. Under these circumstances, I have been kindly permitted to offer what I can, in extenuation of what probably is my error.

I would begin by laying it down, that policies of insurance are to be construed like other written instruments; and, in order to justify this position, would refer to Lord Ellenborough's observation in *Robertson v. French*.¹ Now the canons of construction prescribe not only how, but what, we are to construe. Thus, a fundamental rule, applicable to the construing of written instruments, I take to be, that within themselves we are to look for that which we have to interpret; that there, or nowhere, is the subject matter of construction to be found; and that beyond these written precincts we must not wander so as (for example) to enlarge or narrow, or in any way to vary, the terms of an agreement which is once *in scriptis*. From that moment it is fixed. Its boundaries are unalterable. All beyond the paper is beyond the contract. I am aware, at least I believe, that what I have been premising will not be controverted; but I must state my *postulata* before I can apply them. But, though the operation of a written contract cannot be controlled or qualified by anything *dehors* it, it is liable to be rendered inoperative by something extrinsic,—I mean fraud. But if a written contract be allowed to operate at all, it

¹ 4 East, 130, 136.

can operate no otherwise at law than according to, and commensurately with, the boundaries of the writing. Its effect and activity are, as it were, imprisoned strictly within those limits.

I shall recur to this part of my subject, for the purpose of noticing one of the topics of that candid, clear, and powerful argument which we have from Mr. Holmes; the accuracy and correctness of whose statements of the import of my charge, I unequivocally and thankfully admit. The topic which I advert to is that in which he observes, that he does not seek to vary a written contract; but to avoid it altogether, on the ground of a concealment which ought, he says, (if conversant about a material fact,) to annul the contract; though we concede that the omission, which produced this virtual concealment, was in no degree fraudulent, but wholly innocent and undesigned. For the present, let us observe how jealously and strictly the rule has been applied that nothing collateral or extrinsic, though its affinity be close, shall be allowed to enlarge, narrow, or otherwise alter the operation of written instruments, or in any way extend its foundations beyond the writing. This strictness will appear from the cases of *Gunnis v. Erhart*,¹ and *Powell v. Edmunds*.² In the former an auctioneer set up an estate for sale, which in the written conditions was stated to be free from incumbrances. It turned out there was a charge affecting the estate, and the purchaser thereupon refused to complete his contract. It was not permitted to the seller to prove that, at the very time of the sale, the auctioneer had given public notice of the incumbrance. In the latter case, where printed conditions of sale of timber omitted to state the quantity, parol evidence was rejected, that at the time of the sale the auctioneer warranted a certain quantity. And the conclusion of Lord Ellenborough's judgment may deserve notice; where he says, "The only question which could be made is, whether, if by a collateral representation, a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence."

If, then, the position with which I have set out, supported by the case which I commenced by stating, be a sound one, "if" (I use Lord Ellenborough's words) "there are no peculiar rules of

¹ 1 H. Bl. 289.

² 12 East, 6.

construction applicable to a policy of insurance, which do not equally apply to other instruments, and in all other cases," then, evidence of matters *dehors* the contract is not admissible to vary it. So, too, *Kain v. Old*,¹ and *Pickering v. Dowson*, per Gibbs, J. After observing that the contract had been reduced to writing, he says, "by that alone the parties are afterwards to be bound, unless some fraud can be shown. Even if there had been a representation, it would not have availed. If a man brought me a horse, and makes a representation of his quality and soundness, and we afterwards agree in writing for the purchase of the horse, that shortens and corrects the representations, and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case. If" (he thus proceeds) "there had been any fraud, I agree it would not have been done away by the contract. But in this case there is no evidence of any fraud."

Now may I presume to say, look to my charge, and see whether it has laid down anything broader than, or otherwise differing from, the doctrines which I have just been citing. And, in the case in which I charged, fraud is negatived by the verdict. In *Kain v. Old*, Lord Tenterden approves of what Gibbs, J., had laid down; and which indeed I should conceive to be no more than the assertion of a fundamental rule of evidence and of the law of contracts.

It seems worthy of observation that the policy of insurance here contains no stipulation or conditions indorsed upon it; and the only condition in the body of it is a warranty that Abbott's life was insurable; that is to say, that he had not any of certain specified disorders; nor any other disorder tending to shorten life. Now, on the present argument, the finding of the jury conclusively establishes this, that Abbott's life was insurable; that he labored under none of those diseases tending to shorten life, by which alone the evidence had sought to show that he was affected; and therefore, in other words, and subject to an observation which I have to make, that the condition of the policy was, on Abbott's part, complied with and performed.

And if Gibbs, J., and Lord Tenterden were right in saying that where the agreement is reduced to writing, by that written

¹ 2 B. & Cr. 627, 634.

contract alone (unless in a case where fraud is shown) shall the parties be thereafter bound; and that whatever terms are not contained in such writing do not bind, and must be struck out of the case; if all this be so, then where there is a warranty as to the life, and no other stipulation, either in the body of the policy or indorsed upon it, for where there are indorsements, they are always provided, by the terms of the policy, to be considered as if embodied in it, — I conceive, both on principle, and on the authorities to which I have referred, that representations, if they be not fraudulent, are out of the case; and that either innocent and unintentional misrepresentations, or an innocent and undesigned omission to communicate facts, (even though a jury should consider those facts to have been material,) cannot avoid a contract, which has not stipulated for full and accurate collateral representation; cannot annihilate a policy, the written conditions of which have not been broken.

I would here refer to *Ross v. Bradshaw*,¹ *Willis v. Poole*,² *Pawson v. Watson*,³ and *Haywood v. Rodgers*.⁴ In *Pawson v. Watson* (in which the marginal note is very incorrect) I have read the judgment of Lord Mansfield with attention, and it seems to me to bear strongly upon the present case; and, I would presume to add, to maintain doctrines consonant to the import of my charge. There is a sentence in his lordship's judgment which, or rather a part of which, might, if it stood alone, on a hasty or first perusal, appear to lay down the law differently. Marking the "distinction between a warranty, which makes part of a written policy and a collateral representation," he adds, that if the latter be "false in a point of materiality, it makes the policy void." If this position were completely insulated, it would seem to follow from it that my charge was a misdirection; that I ought to have charged the jury thus: "Though a communication of the fact omitted to be disclosed formed no part of the conditions written in the body of the policy, or indorsed upon it, and though you are persuaded in this omission there was no fraud; yet, if you consider the undisclosed facts to have been material, the policy is avoided by the omission, and you ought to find a verdict for the defendant." Thus the case might stand, if the passage

¹ 1 W. Bl. 312; and more fully in 2 Marsh. Ins. 733. 3d edit.

² Marsh. Ins. 774, 3d edit.

³ 2 Cowp. 785, 787.

⁴ 4 East, 590.

which I have extracted from Lord Mansfield's judgment were an entire sentence and stood alone. But it is neither an entire sentence, nor does it stand alone. And if interpreted as I have, for argument, been interpreting it, it not merely overrules my charge, but overrules a part of the very sentence in which it is found, as well as other positions of his lordship's judgment, and other cases which I have cited, and may have to cite.

To begin with the sentence itself, and complete what, in order to furnish an argument against myself, I have had to mutilate, "A collateral representation," observes Lord Mansfield, "if false in a point of materiality, makes the policy void." Does the sentence end here? No. The very punctuation, — the very word "but," which introduces the remaining member, demonstrates that it does not. "But," continues he, "if not material, it can hardly ever be fraudulent." Then what does the entire of the sentence pronounce? That a false and fraudulent representation, collateral to the contract, shall avoid it; and that, as immateriality may be evidence that the representation was not fraudulent, materiality, on the contrary, will be evidence that it was. Now, I distinctly charged the jury, that if they believed the omissions here to have been fraudulent, they ought to find for the defendants; and, I as distinctly told them, that the materiality of the undisclosed facts were deserving of their attention, so far as such materiality might be evidence that the omission was not innocent, but fraudulently designed.

I have collated the different members of one sentence in Lord Mansfield's judgment; let me now mutilate it once again, — let me strike out the last member, — let me make it assert this: that a false representation, making no part of the policy, but collateral to it, shall avoid such policy, — whether such false representation be fraudulent or not. And having so interpreted the words, let us contrast the doctrine which we elicit from them, not only with the positions of Lord Tenterden and Gibbs, J., to which I have already referred, but with other passages, and the general context of this very judgment of Lord Mansfield. Having first inquired whether any case could be shown establishing a difference between a written and a parol representation, no answer was returned; no such case was shown. The manifest object of the inquiry was, to ascertain whether his lordship was justified in considering that, in the case before him, it was not a fact of any importance

that the collateral representation was in writing. His lordship then proceeds to say, that "there is no distinction better known than that which exists between a warranty or condition, which makes part of a written policy; and a representation of the state of the case" which, his language necessarily suggests, does not make a part of it. He thus continues: "Where it is part of the written policy, it must be performed. It must be strictly performed." Why? I am still using Lord Mansfield's words; "as being part of the agreement." Is not this to say distinctly, that the obligation to performance depends on this, — whether that which a party is required to perform is part of the agreement; and that whether it is or is not part of the agreement depends on this, — whether it is a warranty or condition, "which makes part of the written policy; or a mere collateral representation," which does not. "But if there be fraud in a representation, it will avoid the policy." And how and why? I still extract his lordship's words — "as a fraud, but not as a part of the agreement."

Thus, from this and other authorities I seem to collect, that a party may annihilate and lose the benefit of his agreement in two ways — either by a breach of its conditions, or by a breach of honesty and good faith; in other words, by fraud. But where the agreement is in writing, it is in the written contract alone we must look for the terms and conditions; and doing so, I find no breach of condition to have been committed here; and of fraud the plaintiff stands acquitted by the verdict of a special jury. I will close my observations on this case, by giving the question reserved for the opinion of the court: I give it in the words of Lord Mansfield's own report: "The question reserved for the opinion of the court is, whether the written instructions shown to the underwriter are to be considered as a warranty, inserted in the policy, or as a representation, which would only avoid the policy, if fraudulent. In *Haywood v. Rodgers*,¹ although a ship case, I apprehend that the reasoning of Lord Ellenborough will be found to apply strongly to the present case. Observe, too, how in referring to *Carter v. Boehm*,² his lordship lays the foundation of his reasoning: "The reason," says he, "of the rule which obliges the party to disclose is, by Lord Mansfield, laid down to be, to prevent fraud."

¹ 4 East, 590, 596.² 3 Burr. 1905.

This seems no unfit place for recurring to a topic of Mr. Holmes's, which I have adverted to already. And I hope he will acquit me (for I deserve to be acquitted) of the fraud of offering a compliment at the expense of sincerity and truth, when I declare that I have never heard an argument from him which did not strike me to be as strong as the cause which he supported, and which produced it, would afford. "We do not seek," says he, "to vary, but to annul; to show that by reason of certain concealments, the instrument in question is altogether void." But let us first observe, and always recollect, that, *ex concessio*, this case is quite exempt from fraud. The concealment is pronounced to have been innocent and honest, by a verdict which it has not been attempted to set aside. Now, the only exception that I find in the cases (as I construe them) to the rule, that you may not resort to matter *dehors* a written contract for the purpose of avoiding it, is a case of fraud: that is to say, a case which, *ex hypothesi*, this is not. This exception is recognized in *Doe d. Small v. Allen*.¹ Secondly. While I am far indeed from imputing sophistry to (I say it in all sincerity) as candid and fair an argument as I ever listened to, I doubt whether this topic of it may not have originated in an oversight which enables me to answer it. I doubt whether it does not originate in a certainly innocent, not fraudulent, omission on the part of Mr. Holmes, to observe that he is doing what he does not profess or mean to do. "I ask not," says he, "to vary: my object is to annul." But is he not, in the first instance, obliged to vary in order to produce the state of things, and the agreement, which are to annul? Can we add to without varying? And does he not add to the terms of the agreement a stipulation which that written contract does not contain? A stipulation, not merely that the insured shall, in addition to his warranty answer truly every question contained in the company's list; not merely that he shall not designedly and fraudulently withhold information, even on matters respecting which he is not questioned; but that he shall be bound to supply any deficiencies which may have arisen from the negligence or inadvertence of the insurers; that he shall be bound to imagine questions which have not been asked; and, if his invention do not supply them, or his memory, however innocently, fail

¹ 8 T. R. 148.

to glut those imaginary inquiries with copious and accurate information, that the contract shall become null and void, and valueless to him.

In the case before us, there is a warranty. And what, in *Pawson v. Watson*,¹ does Lord Mansfield say, bating the effect of fraud? "If in a life policy a man warrants another to be in good health, when at the same time he is ill of a fever, that will not avoid the policy; because, by the warranty he takes the risk upon himself. But if there is no warranty, and knowing nothing about it, nor reason to believe the contrary, he only says he believes the man to be in good health, this, though the person is not in good health, will not avoid the policy, because the underwriter then takes the risk upon himself." But in either case, if there be fraud, — as if a man warrant another to be in good health, when he knows, at the same time, that he is ill of fever; or, in the case of no warranty, if he deliberately assert that a man is well, whom he perfectly knows to be ill, — "then," says Lord Mansfield, "as fraud vitiates every mercantile contract, such fraudulent representation will avoid the policy; as a fraud, but not as a part of the agreement." Now, in the present case, we have a warranty, and a conclusive negation of all fraud. I would ask, do we not vary a written contract by avoiding it on grounds different from, and added to those, on which alone itself has provided that it shall be void? I conceive that it can be avoided only in the alternative; on grounds found within itself, or which are supplied by fraud. Nay, in avoiding a contract on the ground of fraud, we can scarcely be said to be travelling out of its conditions, or wandering into matter *dehors* the instrument. Why do I say this? Because, in addition to the express conditions, this is, by intendment of law, a tacit and implied condition of good faith, as contrasted with fraud, inherent in every contract, the breach of which shall be sufficient to avoid it.

To return. Does not Mr. Holmes begin by varying the written contract — by adding to it a stipulation which it does not contain; and then annul it, because this interpolated condition is not complied with? To vary may not be his end; but it is only by varying he acquires the means for accomplishing his avowed purpose, namely, to annul. Now, to vary a written contract, he

is not entitled ; whether for the purpose of attaining an end, or of providing himself with means for its attainment. And observe one of the consequences, as it appears to me. Here, *ex hypothesi*, are two innocent parties — the company and the insured. Of these, which is in default? Which has been in some degree negligent and remiss? Those who have not made an inquiry which they could have made, and which might have produced information that we will assume to have been material? Or he, who innocently, (keep this in mind,) having answered the questions asked, happens to stop there, without any fraudulent motive for so doing? Where, if any, is the negligence or default? I should say on the part of the innocent company. And on whom is the loss and penalty to attach? On the found to be not less innocent insured. Is this conformable to the rules usually applied to the case of two innocent persons, one of whom must suffer? And what has the sufferer here done? He has committed no fraud. He has only not done more than perform his contract. But what matters it to a company, asks Mr. Holmes, (and the question is a pertinent one,) whether the silence and omission from which they suffer were innocent or a fraud? But I, in my turn ask, Do they, properly speaking, suffer from the innocent silence and omission of the insured? Do they not rather suffer from their own negligent omission to frame such a contract, incorporating, if you please, such questions as would have secured them, and obliged the insured, by the very terms and conditions of his agreement, and at the consequent peril of its avoidance, to be not only innocent, but unexceptionably full, accurate, and alert ; making it part of the written condition that those questions should be duly answered?

But how, it may be said, could the company so know the events and history of the life of a would-be-insured, as to point and aim particular and appropriate questions? I answer, could they not frame a general and sweeping one, sufficiently comprehensive to embrace all material cases, and make it part of the written terms that this sweeping question should be fully answered? Or (which is nearly the same thing) could they not make it a condition in the policy, that it should be null if it appeared that the insured had, though from mere accident, withheld any communication respecting his health, which should be afterwards proved

and found to have been material. See the case of *Huguenin v. Rayley*,¹ to which I shall presently recur.

But it may be said to me, "You are requiring a stipulation against innocent concealment and omission; and maintaining that, for want of such stipulation, innocent omission shall not annul. Now, is there usually any stipulation against fraud? And yet fraud is held sufficient to avoid a contract." No; I admit that there is, in terms, no stipulation against fraud. But such a stipulation, as I have said already, is implied in the case of every contract, by rules of law established and defined, and extending to fraudulent suppression, but not to innocent omission. And these rules of law, and the limit set to their operation, seem to be founded in, and warranted by, reason and substantial justice. A party's own diligence — although due diligence were applied — might often be insufficient to protect him against fraudulent contrivance and device. Therefore the law steps in, and affords him a protection of which he stands in need; and, in affording it, discourages and deters from fraud, by inflicting on it the penalty of being abortive. But in other cases, the law, which *dormienti-bus non inservit* leaves the party, as in the fable Hercules did the wagoner, in the first instance, to be vigilant and help himself. Nay, this conduct of the law may be traced to another of its maxims. Fraud is tortious; and the law permits no man to take advantage of his own wrong. But is simplicity, error of judgment, mere forgetfulness, a tort? Then the value and efficacy of a dealing would rather be the prize of shrewdness and memory than the reward of probity and good faith.

I will not deny that the case of *Huguenin v. Rayley*, especially its conclusion, somewhat startled me at first. It rose, like an opposing fortress, directly across my path and almost persuaded me that I ought to change my line of march. But, on examination, it appeared that the context of cases *in pari materia* would supply me with a charm, by means of which I could pass through it; or, at least, that these cases, and perhaps a part of its own materials, might form the rounds of a ladder by means of which I could surmount it. In the transaction which produced this case of *Huguenin v. Rayley*, it was expressly provided that if, in the declarations as to the state of health, there occurred a misrepre-

¹ 6 Taunt. 188.

sentation or reservation, the contract should not be valid, or, in other words, should be void. This, therefore, was a condition,—a condition embodied in the written contract; and, collating the other cases with this in Taunton, and even when I search and scrutinize itself, I consider it as a mere construing of the condition. The reservation imputed was an omission to declare that the insured, a woman, was a prisoner. If this touched the state of her health, and was material, it was clearly such a breach of the contract as, by the very terms of the written contract, avoided it. Now considering the evidence of the physician, it could not be said the fact reserved in no degree touched the question of the state of the woman's health; and whether in a material degree (for *de minimis non curat lex*) ought therefore to have been left to the jury. Thus I interpret this case: both because I consider its circumstances as warranting this construction; and because, in so construing it, I conceive that I make it harmonize with cases not pronounced to be overruled.

But why leave the question of materiality to a jury? I have already attempted to give an answer to this question. Let me be allowed to amplify the answer by an illustration. Whether a person wore linen, flannel, or calico next the skin, had taken the small-pox naturally, (as it is called,) or by inoculation; whether he ate much or little, plain dishes or ragouts, of one dish or of many, at his meals; whether he drank a glass or half a pint, or a pint of wine after dinner; whether he took tea in the evenings; whether he breakfasted on tea, or coffee, or cold meat, all this might touch the question of his health; yet if he reserved no more than such gossiping details, such observation might seem far too immaterial to amount to a breach of the condition, which could only be interpreted to prohibit material reservation. Thus materiality would become a pertinent inquiry; and, being of the nature of fact, must be submitted to a jury. *Ad questionem legis respondent iudices*: the court construes the condition. *Ad questionem facti respondent juratores*: a jury pronounces on the disputed and dubious fact.

The case of *Morrison v. Muspratt*¹ was but that of a new trial. And though I do not wish to dwell with emphasis on that part of the rule which relates merely to the costs, yet it is not

¹ 4 Bing. 60.

altogether unworthy of observation, that it was that rule which a court would make that intended to acquit the judge of misdirection. In that case, too, the materiality of the fact is insisted on. I doubt whether I succeeded, a few days ago, in conveying my ideas on this circumstance of the case. What I meant was this : that, even in cases where the policy is founded partly on representations, — where these form part of the conditions, and consequently of the contract, — that even there, the materiality of the misrepresentation or omission will form a suitable appurtenant inquiry, and a part of the case of the company, which seeks to avoid the policy. And why? Because it never could be the object of the condition to obtain an interminable detail of every trifle, through the series of a man's life, which could be said to touch, however slightly, the question of his state of health. Because, therefore, an omission or inaccurate representation, which was not only perfectly innocent, but utterly immaterial, ought not to be allowed to avoid the contract ; misrepresentation, which was found to be quite immaterial, would be held to be substantially no misrepresentation, — under the maxim already cited, *de minimis non curat lex*. Thus the case last cited may have decided, not that where the written contract is not founded on representations, these notwithstanding, and though not fraudulent, shall be gone into ; but that even where the policy is founded, in the whole or in part, on representations, it must, towards defeating it, be shown, not only that there were omissions or misrepresentations, but that these were material ; that they interfered with the object of the condition and substance of the contract. One of the cases cited, *Maynard v. Rhodes*,¹ ascertains that the party negotiating an insurance on his life is answerable for more declarations than those made by himself. But with this doctrine, my charge in no degree conflicted. The equity cases resorted to by Mr. Holmes, I conceive to rest on the equitable principle of rectifying mistakes in deeds.

There is, in the case before us, a proviso in the policy, that Abbott never had any disorder which tends to shorten life. If this is to be understood quite literally, the condition is broken ; and there is no more to be said, but that the plaintiff ought to fail. But such could not, as I conceive, have been the meaning

¹ 5 Dow. & Ry. 266.

of the contract ; and to construe it so literally would, I think, be absurd. Never ! This would extend backward to the moment of the party's birth, perhaps to an antecedent period. Again, who ever attained twenty without having had, and escaped from, some more or less perilous distemper ? Teething, croup, worms, measles, many of the ordinary diseases of childhood and early years, fever, (thirty years before the insurance,) and so forth ; all these, under such a literal interpretation, would vitiate the policy. How indeed could we reconcile a condition which, so interpreted, would at once require that the insured should have had the small-pox, and never should have had any life-endangering disease ? The proviso must, therefore, mean a disorder which permanently tends to shorten life.

If the cases of *Lindenau v. Desborough*,¹ and *Morrison v. Muspratt*,² were decided without reference to the form of the policy ; and if the judge intended to apply their observations to every case of insurance contracts ; then my charge would appear, on those authorities, to have been an exceptionable one. I have, however, suggested my reasons for thinking that they were decided on the grounds of the form and import of the policies in these cases. Indeed, in general, as to the decisions which have been relied on at the bar against the plaintiff, perhaps, if carefully perused, they will not be found to overrule those which I have cited in his favor, nor (which may deserve attention) does any one of them propose to do so. In *Everett v. Desborough*,³ the tenth condition indorsed on the policy was, that two persons were to be referred to as to the state of health of the insured, — one to be the usual medical attendant of the party ; and it was further provided that if the conditions were not complied with, the policy was to be void. Now, it appeared distinctly that the usual medical attendant was not referred to, and therefore the plaintiff could not recover. But I do not perceive that that case establishes anything against the charge given by me in the present one. On the contrary, I conceive myself to have laid down the law in exact conformity with that decision. For in *Everett v. Desborough* the contract was broken ; and if the court had not decided against the plaintiff, they must there have done what, according to my views, the court is here solicited to do ; that is

¹ 8 B. & Cr. 586.
VOL. III.

² 4 Bing. 60.
21

³ 5 Bing. 503.

to say, they must have varied the contract which the parties entered into, by declaring a policy valid under circumstances under which the parties had, in writing, agreed it should be void. Thus if my views were not erroneous, it would seem to follow that a case in which the court refused to vary the express contract of the parties is relied on as an authority to show that, in the case before us, the court ought to allow a written contract to be varied by parol. The words of Best, C. J., in giving judgment in *Everett v. Desborough*,¹ seem deserving of attention, and to support my view of the grounds of that decision. "The contract," says he, "is not confined to what is contained in the body of the policy; but embraces the conditions indorsed on it; and embraces the representation required by those conditions." Now, if this be so, the insurance in *Lindenau v. Desborough*² was, by the contract, founded on representations. The same reasoning would apply to, and explain, the case of *Maynard v. Rhodes*.³ So in *Bufe v. Turner*,⁴ a condition of the policy was, that if the buildings were described otherwise than they really were, so as the same were charged at a lower premium than was therein proposed, such policy should be void. Now, that policy was effected when the ruins of the next house were smoking, and the fact was not communicated; and this being, as I conceive, the case of a breach of a condition of the policy, is (for the reasons above stated, as to *Everett v. Desborough*) no authority against the plaintiff here. I think, and call the case of *Bufe v. Turner* one of breach of condition; for it appears to me that when the condition was, that the policy should be void "if the buildings were described otherwise than they really were, so as the same were charged at a lower premium," the suppression of the *proximus ardet* fact, one so calculated to affect the rate of premium, cannot well be denied to have been a breach of the stipulation. But, in the case before us, the only condition in the policy is, by the finding of the jury, ascertained to have been complied with.

As to the cases of *Lynch v. Hamilton*,⁵ and *Lynch v. Dunsford*,⁶ — while, on the one hand, it is true that they are both referred to in 1 Marsh. Ins. 471; it is on the other hand equally

¹ 5 Bing. 517.² 8 B. & Cr. 586.³ 5 Dow. & Ry. 266.⁴ 6 Taunt. 338.⁵ 3 Taunt. 37.⁶ 14 East, 494.

true, that in a subsequent page¹ of the same book, *Haywood v. Rodgers*² is referred to as settled law; and *Haywood v. Rodgers* I conceive to be an authority for the plaintiff here. Therefore, am I doing more than has been done by Marshall? In citing *Lynch v. Hamilton* and *Lynch v. Dunsford*, and (in a subsequent page) *Haywood v. Rodgers*, as settled law, has he not virtually asserted that they are all consistent? That the third asserts no principles that overrule the former two? Nor the two former any principles which conflict with it? As to *Lindenau v. Desborough*, on reading the case, it will be plain that the life was not insurable. But even if it were, I think the form of the policy, which had a variety of conditions indorsed, shows that it was an insurance founded principally on the representations.

The cases referred to by the plaintiff show the distinction between insurance on representations, and where there is a warranty, — a distinction very strongly insisted on by Lord Mansfield. It appears as if it had been formerly considered that, in the case of a policy on representations as to the life, as the premium was to be calculated with reference to those representations, the insured took the risk upon himself of showing that the data on which the calculation was made were true. But in case of a warranty, as to the insurability of the life, the premium on all insurable lives being (allowing for the age) the same, the omission to represent any matters could not affect the policy. I beg here to refer again to cases already mentioned: namely, those of *Ross v. Bradshaw*,³ *Haywood v. Rodgers*, *Willis v. Poole*,⁴ and *Pawson v. Watson*.⁵

Now, in the modern policies of insurance, as in *Lindenau v. Desborough*, *Everett v. Desborough*, and others, the various conditions in the policy demonstrate that the company did not rest simply on the warranty; and in the first mentioned of those cases, *Lindenau v. Desborough*, the conditions indorsed show clearly that (agreeably to what is become a common course with insurance companies at this day) the insurance was founded on, and the risk calculated by, representations.

In the report of *Lindenau v. Desborough*, and some of the

¹ Page, 475.

² 4 East, 590.

³ 1 W. Bl. 312; 2 Marsh. Ins. 793. ⁴ 2 Marsh. Ins. 774; Park. Ins. 650.

⁵ 2 Cowp. 785.

other cases, the form of the policy is not given. But I have seen a copy of the policy in *Lindenau v. Desborough*, which shows that the premium was calculated, partly at least, on the representations of the insured. The following is part of one of the paragraphs in that policy: "We, relying upon the truth of a certain declaration (giving the date) by the said Bernhard Von Lindenau in compliance with the conditions hereupon indorsed," (then follows the substance of such declaration,) "do hereby agree," &c. &c. The concluding clause in the policy is as follows: "Provided that this policy and the assurance hereby effected shall, at all times, and under all circumstances, be subject to such conditions and stipulations as are contained in the printed proposals indorsed hereon, in the same manner as if the same were here actually repeated." Then indorsed I find this heading: "Conditions of life assurance." This is followed by the "particulars to be stated." The last of these is, "Names and residence of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured. One to be the usual medical attendant of the party." And then ensues in print, *i. e.* writing, the important conclusion which I am about to give: "A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such declaration be not, in all respects, true, the policy will become void; and the premium that may have been paid will be forfeited."

Where the written terms of contract were such, Gibbs J. would have pronounced, and I would decide, that omission or misrepresentation, however innocent or inadvertent, touching the particulars of the indorsed conditions, would avoid and nullify the policy; because we could not determine otherwise, without varying the written contract. All the cases could, I think, be reconciled, without violating that fundamental principle of evidence laid down by Gibbs, J., in the case to which I have referred; and which is sought, as I conceive, to be infringed in the present case. I apprehend that those cases might be reconciled in the following way: First, the cases may be held to show that, where there is a warranty on the life contained in the policy, and nothing more, the company are considered as relying on that warranty; and representations are out of such a case. Secondly, if there be no warranty as to the life, then the risk must be calculated upon

inquiries as to the life ; and which inquiries, being of course made of the assured, he is bound, in answer, to state correctly and truly those matters by which the rate of premium is or ought to be calculated. To the authorities on this head, I have referred already.

But from the rule of law laid down in those cases it would seem as if insurance companies, not satisfied with the mere warranty of the life, thought fit to adopt new forms of policies, containing, as in *Lindenau v. Desborough*, several conditions ; by means of which it appears that policies are now, as in that case, founded both on warranty and on the representations of the party ; and that the premium is calculated as much on the latter as on the former. If then it appears on the face, or if you please, on the face and back of the written contract, that it is founded even partly on representations, the rule contended for may apply, without violating that more essential rule insisted on by Gibbs, J., recognized by Lord Tenterden, and arising from a deeper source than the *dictum* or decision of either, — I mean from the fundamental principles of evidence. But, in this case, it appears on the face of the written contract that the policy was founded on the warranty.

To enlarge the area of the foundations of this agreement, and make its basis wider than the policy itself has made it, would be, in the same degree, to vary the terms of a written contract, decide on an agreement, framed, not by the parties, but by ourselves. Nay, even if to what is contained within the four corners of the written contract it were allowed to add, as part of the foundation, *bonâ fide* answers to inquiries, free from fraudulent suppression, — then that in the present case there was no such, nor any fraud, a very respectable jury has pronounced. And still, for argument, giving a range and latitude to this contract which it has not given to itself ; and with reference to my notice, that the extent of the obligation of the insured to give a narrative of his past state should at all events (still supposing and insisting on the absence of all fraud) be measured by and confined within the number and import of the questions which are put to him ; the court will be found in *Lindenau v. Desborough* to dwell on the comprehensive import of a question, and its calling intelligibly for a fuller answer than it received ; implying that if the questions asked

were answered, this was enough, even in case of a contract of which representation founded the basis.

But to return to my doctrines, — or rather those of Lord Tenterden, Gibbs, C. J., and others, as to not going out of the written contract, — are these doctrines antiquated and out of use? Let *Flinn v. Tobin*¹ answer this.

In conclusion, I feel that if I were to decide this case upon an impression that, though the jury found otherwise, a fraud was in fact committed, and a life tainted with scrofula or consumption was surreptitiously insured; that, if I did this, I should not only be indirectly impeaching a verdict of a respectable special jury, which the unsuccessful party had himself not ventured to impugn; but that I should be making a decision which might govern cases where the very opposite feeling must exist. For if my charge was wrong here, then it would be decided that an insurance company would be entitled to recover, in a case where it was as clear as light that the life was insurable, free from every disease tending to the abridgment of human life; where it was manifest and conceded that no fraud polluted the transaction, but was fair and *bonâ fide*; where the insurance was founded on a warranty; where the questions proposed were all answered, but where a collateral fact was innocently omitted to be stated. And that the company would be so entitled to recover, on a contract in writing, containing no stipulation whatsoever that an omission such as I have described should avoid the policy.

FOSTER, B. It would be impossible for me to differ from my brother Smith without feeling some apprehension that I had fallen into an error. That apprehension, however, is lessened by the very able judgment of my lord chief baron. He has at once stated my conclusions, and the train of reasoning by which my mind has been led to them. I should therefore be inexcusable if I occupied any time in the discussion of this question. In no contracts does it appear to me that the parties deal on so unequal terms as in contracts of insurance. One party has all the information, and the other is perfectly ignorant. It is with reference to this view that the principle has been clearly established, that that inequality of knowledge ought to be rectified as much as possible before the contract is entered into. It may be asked,

¹ Moo. & Mal. 367.

Shannon v. Nugent.

Must a party, before effecting an insurance, give a minute detail of every trifling incident of his whole life? The answer is, Those incidents and occurrences which are trifling he need not communicate; but he is bound to give information of every material circumstance, and none else. The deciding upon their materiality is the province of the jury, and, by that doctrine, the interest of the party insured will be little endangered. I do not take it upon myself to say, whether or not an indolent tumor is dangerous; but the medical witnesses seem to have thought that it was, and that its existence ought to have been communicated to the company. It was therefore the duty of the judge to have submitted the question of its materiality to the jury for their decision.

Judgment for the defendants.

SHANNON vs. NUGENT *et al.*, Directors of the Provident Insurance Company.

(Hayes, 536. Exchequer, 1832.)

Wager policies.—*Semble*, that wagering life policies in Ireland are lawful; and that in an action on such a policy interest need neither be averred nor proved.

THIS was an action on a policy of insurance effected by the plaintiff on the life of Mrs. Bridget Lee, who was the daughter of his wife by a former husband. The policy was effected at Limerick, in August, 1830, for the sum of £500, and was wholly silent as to interest. Mrs. Lee died in October, 1830. The trial took place before Pennefather, B., at the summer assizes for the city of Limerick, in 1831. And although there was no averment in the declaration of any interest existing in the assured at the time of effecting the policy, it was thought prudent on behalf of the plaintiff, that interest should be proved, inasmuch as there was no statement of "interest or no interest" on the face of the policy. Evidence was accordingly given that Mrs. Lee, before she was married, and while yet a minor, had been supplied with board and lodging by the plaintiff in his family from 1816 to 1823; that, after her marriage, she had declared that she had received a marriage portion of £300 from him, and that he had given her a sum of £80 to enable her to set up a shop. At the time of effecting the policy, these statements of interest were

communicated to Mr. Vokes, the Limerick agent of the company, who expressed himself satisfied.

This evidence was left to the jury, and a verdict was found for the plaintiff.

G. Bennet, for the defendant, now moved that the verdict should be set aside, for the misdirection of the learned judge, and for his allowing illegal evidence to go to the jury. It is laid down in all English authorities, that a policy of insurance is a contract of indemnity, and that a plaintiff cannot recover beyond the injury sustained. If he has suffered no injury, it follows, of course, that he shall recover nothing; *Godsall v. Boldero*;¹ *The Sadlers' Company v. Badcock*.² It behoved the plaintiff, therefore, on the trial, to prove the extent of his injury; and, as in every other case, that should have been made out by legal evidence. With respect to the items for board and lodging, Mrs. Lee was then living in the house of her mother, and was an infant. No evidence was given of any contract or promise to pay. Besides, any action which the plaintiff could have had was barred by the statute of limitation at the time of effecting the policy. The other items rest solely upon evidence of a declaration by Mrs. Lee, when she was a *feme covert*, that she had got the money. It is true that there is no act in Ireland corresponding with the English act, 14 Geo. 3, c. 48, and that, therefore, wagering policies may not be illegal; but in all such cases it ought to be stated on the policy that it is so, and that the parties have disclaimed a contract of indemnity, by inserting the words "interest or no interest," or to the like effect. The company ought to know that it is gambling with a party, and not entering into a *bonâ fide* contract. From the expression of satisfaction by the agent, it is evident that he has been imposed upon by a pretence of interest. *Lucena v. Craufurd*, per Chamber, J.,³ *Cousins v. Nantes*.⁴

J. D. Jackson, contra. It has been often pressed upon the courts of this country that policies of insurance are contracts of indemnity; but, as a general proposition, nothing can be more untrue. They may be contracts of indemnity, if the parties please it; but it by no means necessarily follows that they are. The notion seems to have originated chiefly in some expressions

¹ 9 East, 72.

³ 3 Bos. & P. 75, 101.

² 2 Atk. 554.

⁴ 3 Taunt. 513.

of the court in *Godsall v. Boldero*; ¹ but those expressions must be taken *secundum subjectam materiam*. In that case, the policy was founded upon interest, and can, therefore, bear no analogy to the present, where no mention whatever is made of interest either in the policy or declaration. All the authorities which can be adduced in favor of the English doctrine, with the exception of the *dictum* of Lord Hardwicke in *The Sadlers' Company v. Badcock*, ² have been decided since the English statute; and, therefore, tend rather to prove the reverse of what they are cited for. If insurance policies were, at common law and in their nature, contracts of indemnity, why should a statute be passed enacting that they should be so? But, then, it is said that this policy not expressing on its face that it is a wagering policy, it must be taken to be a policy upon interest; and being so, interest ought to have been averred in the declaration, as well as proved in evidence. If the defendant be right in that, he ought to have demurred to the declaration. It never has been decided that the interest which the insured ought to have is a legal interest; it is quite sufficient, if it be an equitable interest affecting the conscience of the party. But it is too late to go into that question now. At the time of effecting the insurance, the facts which constitute the interest were candidly told to the agent, who must be looked on as identical with the company; and he expressed himself satisfied. However, it has been already decided in this country that when interest is not averred in the declaration, it need not be proved. [PENNEFATHER, B. The courts may have gone to that extent.]

Curran, in reply. In England, when a policy is silent as to interest, it has always been taken to have been effected on interest; Hughes on Ins. 24, citing *Cousins v. Nantes*; ³ and with respect to cases in England which do not fall within the 19 Geo. 2, c. 37, the law there is the same as in Ireland. It is clear, therefore, that the defendant might have demurred; but although he has not done so, the court would not be justified in upholding a verdict obtained upon a policy founded on interest, where interest was not proved.

JOY, C. B. We are of opinion that the verdict should stand.

¹ 9 East, 72. Overruled in *Dalby v. India & Lond. Assur. Co.*, ante, vol. 2, p. 371.

² 2 Atk. 554.

³ 3 Taunt. 513.

 Schweiger v. Magee.

It is not necessary for us now to decide whether a life insurance made in Ireland must be on interest. Our leaning is, that interest is not necessary to give it validity. The cases of marine insurance all go on the custom of merchants, who are presumed to have an interest, and not to effect insurance for the purpose of gambling. In such insurances, also, it is important for the insurer to know whether or not they are founded on interest. In life insurances, the same reason does not apply, and where the reason is different, the decision ought not to be the same. If it be necessary in this country that the insurance should be founded upon interest, and interest not having been averred in the declaration, the defendant has his remedy in another way, and it is not necessary to set aside the verdict. As to the other points, we think that sufficient ground has not been laid to set aside the verdict.

The other barons concurring, the motion was

Refused with costs.

Note. — The question was settled in the exchequer chamber two years later in the following case : —

SCHWEIGER, FRAMPTON, AND BETHAM, Knight, three Directors of the British Commercial Insurance Co. *vs.* JOHANNA MAGEE.

(Cooke & Al. 182. Exchequer Chamber, 1834.)

Wager policies. — Where the plaintiff (below) effected an insurance in this country upon the life of another, and the policy contained no stipulation as to the plaintiff's interest in the life insured : *Held*, that in declaring upon such policy it was not necessary for the plaintiff to aver an interest in the life insured. The 14 Geo. 3, Eng. c. 48, which prohibits wagering policies, is an enacting law. A wagering policy is not illegal in Ireland.

THIS was an action of debt upon a policy of insurance brought by the defendant in error, against the plaintiffs as three directors of the British Commercial Insurance Company. The policy recited that "Johanna Magee, of the city of Limerick, was desirous of making an insurance with the British Commercial Insurance Company in the sum of £500, upon the life of one Daniel Ryan, and hath declared that he the said Daniel Ryan did not exceed the age of thirty-six years, in the month of December, 1825; has had the small-pox, or cow-pox; has not had the gout; has not suffered from a spitting of blood; and was not affected with any disorder which tends to shorten human life;" and further reciting "that the said Johanna Magee hath paid at the office of the said company the sum of £7 2s. 11d. as a premium for one half year, commencing from the date of this policy;" it was declared, that if the said Daniel Ryan shall die at any time within the term of one half year commencing on the 15th day of February, 1826, and ending the 15th day of August, 1826, both days included, or if the said Johanna Magee, her execu-

tors, administrators, or assigns, should in the event of the said Daniel Ryan living beyond the said term of one half year, pay at the office of the said company during the life of the said Daniel Ryan the like premium on or before the 15th day of February and August in this and every subsequent year, the funds and property of the said company should be subject, and liable to pay and satisfy within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the said Daniel Ryan, unto the said Johanna Magee, her executors, administrators, and assigns, the sum of £500 thereby assured. It then contained the usual provisions, that the said Daniel Ryan should not go upon the high seas, or beyond the limits of Europe, or enter or engage in any military, naval, or preventive service, without the previous license of the directors of the company; and that the capital stock and funds of the company should alone be liable. The declaration set forth the policy, and then averred that Daniel Ryan did not die upon the high seas; that he did not, after the making of the said policy, go beyond the limits of Europe, or enter into, or engage in any military, naval, or preventive service, &c. It then averred the death of the said Daniel Ryan on the 1st of August, 1827; that satisfactory proof of his death was made to, and received at the office of the company; that the premiums were, from the time of the making of the said policy until the time of the death of the said Daniel Ryan duly paid to, and accepted by the company; that the capital stock and funds of the company were sufficient to satisfy the said sum of £500; and that three calendar months had elapsed since satisfactory proof of the death of the said Daniel Ryan was received at the office of the said company.

The defendants set out the policy upon oyer, and pleaded, 1st, That the plaintiff had not, at the time of making the said deed-poll, any interest in the life of the said Daniel Ryan. 2d. That the plaintiff had not, at the time of making said deed-poll, and at the death of the said Daniel Ryan, any interest in his life. 3d. That the said plaintiff had not, at the time of the death of the said Daniel Ryan, any interest in his life. 4th. That the plaintiff had not, at the time of making said deed-poll, any interest in the life of the said Daniel Ryan to the amount of £500. 5th. That the plaintiff had not, at the time of making the said deed-poll, and at the time of the death of said Ryan, an interest in the life of the said Daniel Ryan, to the amount of £500. 6th. That the plaintiff had not, at the time of the death of the said Daniel Ryan, an interest in his life to the amount of £500. 7th. That the plaintiff was not damaged by the death of the said Daniel Ryan. 8th. That the plaintiff was not damaged by the death of the said Daniel Ryan to the amount of £500. Issue was joined upon the first, second, third, and seventh pleas, but to the fourth, fifth, sixth, and eighth pleas the plaintiff demurred generally. Joinder in demurrer. The court of exchequer allowed the demurrer, and gave judgment for the plaintiff below. On the writ of error general errors were assigned. Joinder in error.

Woulfe, & O'Loughlen, Sergt., for the plaintiff in error, did not argue in support of the pleas, but they took two objections to the declaration, which they insisted was bad upon general demurrer: 1st. A policy effected in this form, upon the life of another, is a mere contract of indemnity against any loss which the assured may sustain by the death of the person whose life is insured,

as contradistinguished from a wagering policy, in which the parties by express terms, such as the words "interest or no interest," or "without proof of interest," disclaim the intention of making a contract of indemnity. *Lucena v. Craufurd*;¹ and Chamber, J., says, "that a policy containing no such clause disclaiming or dispensing with the proof of interest, was to be considered as a contract of indemnity only upon which the assured could never recover without proof of an interest." The same doctrine is laid down in *Cousins v. Nantes*,² which is an express authority upon the point. That was an insurance upon a foreign ship, and therefore not within the prohibition in 19 Geo. 2, Eng. c. 37; and though the policy was in the common form as here, yet it was held that an interest was implied; and Mansfield, C. J., says: "Every word in the policy shows that it was an instrument to protect merchants; the words at the beginning of the declaration are according to the usage and custom of merchants; it is not the custom of merchants to gamble. If this be so, every policy must be taken to be on interest, unless something be stated not showing to the contrary. In this policy there is nothing showing that it was on interest. If it be admitted, as it is, that interest must be proved at the trial, it must be alleged also, that the defendant may be prepared at the trial to meet it. This policy must be taken to be on interest; to support an action on a wagering policy something must appear to show that it is such." [MOORE J. The cases cited relate to marine insurance.] The same principle has been extended to life insurance, (*Godsall v. Boldero*,³) in which Lord Ellenborough says, "This assurance, as well as every other to which the law gives effect, (with the exceptions only which are contained in the 2d and 3d sections, of the 19 George 2, Eng. c. 27,) is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering." It will be contended that wagering policies upon lives were legal at common law, before they were prohibited by the 14 Geo. 3, Eng. c. 48,⁴ and that as there is no cor-

¹ 3 Bos. & P. 101; S. C. 2 N. R. 269; 1 Taunt. 325.

² 3 Taunt. 513.

³ 9 East, 81.

⁴ 14 Geo. 3, Eng. c. 48. An act for regulating insurance upon lives, and for prohibiting all such insurances except in cases where the persons insuring shall have an interest in the life or death of the person insured.

Whereas, it hath been found by experience that the making insurances on lives or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gambling, for remedy whereof, be it enacted, &c., that from and after the passing of this act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void, to all intents and purposes whatsoever.

Section 2. Enacts, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

Section 3. Enacts, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

Section 4. Enacts, that nothing contained in the act shall extend to insurance on ships, goods, or merchandise.

responding statute in Ireland, such policies may still legally be effected in this country. But that statute is merely declarative; at all events the utmost effect of the argument is that a wagering policy may be legally effected in Ireland, provided it appear in express terms upon the face of the contract that such was the intention of the parties. If, therefore, this policy be considered a contract of indemnity, the declaration should have averred that the plaintiff had an interest in the life insured. But even supposing it to be a wagering policy, they contended, 2dly, that a wager between two indifferent parties upon the life of a third person was illegal at common law. The doctrine that a wager by two indifferent parties, which may affect the interests or the feelings of a third person, shall not be permitted to form the ground of an action, is elaborately enforced by Lord Mansfield in *Da Costa v. Jones*;¹ so also in *Good v. Elliott*,² Buller, J., says: "The question then is, whether there be any sound distinction between a wager, throwing an imputation on another, and a wager which respects his property only. I can find none; but on the contrary I go further; for I hold that though the wager impute no crime or disgrace to another, and though it do not call in question any pecuniary interest of another, yet if it concern the person of another, no action can be maintained upon it." This wager is a warranty by an indifferent person that a third person is not affected with any disorder which tends to shorten human life, and its manifest tendency is to raise a public investigation after that person's death, which may call in question the moral habits of the individual, and may impute hereditary diseases to his family, thus wantonly and impertinently insulting the feelings of the surviving relatives. [JOY, C. B. That objection is equally applicable to policies on interest; besides, the plaintiff does not insult the feelings of the family of the deceased, for he has guaranteed that the deceased was exempt from any of the diseases specified in the policy; it is the company, that by controverting the fact, raises the discussion.] It would be impolitic to extend the doctrine beyond the cases cited, so as to deprive a creditor of the right which he now enjoys of indemnifying himself by an insurance upon the life of his debtor, but by limiting it to such cases no right is abridged, no individual is injured, but gambling is repressed, and wanton inquiries involving the feelings of third persons are obviated. [SMITH, B. Your argument is, that the principles of the common law forbid you to violate public morals or decency unless you have an interest in doing so.] In some countries such contracts are prohibited on the ground of their furnishing a temptation to assassination.

Cooper & Cruise, contra. This policy is in terms an absolute and unconditional contract for a valuable consideration on both sides. On the one side, the company undertake to pay a certain sum of money upon the death of Ryan; on the other side, the assured gives the consideration of the annual premium, which on a regular calculation of the duration of human life is considered by the company an equivalent for the risk incurred. There is no condition contained in the policy that the assured had, at the time of effecting the policy, or should continue to have an interest in the life assured, to the extent of the sum for which the company should be held responsible. And

the company could not have been misled as to the legal effect of the policy, as it is in a form supplied by themselves; and if they intended to annex such a condition to the contract, it should have been inserted in express terms. The cases of marine insurance which have been cited are not analogous either as to the terms, or the legal effect of the contract. Marine insurances are contracts to indemnify against the perils of the sea, and as in such insurances the underwriter incurs a greater liability upon wagering policies, to prevent his being misled by ambiguity, the insertion of the words "interest or no interest" is required, in order to constitute a wagering policy in such insurance; and the reason is stated by Mansfield, C. J., in *Cousins v. Nantes*:¹ "Unless there were words to distinguish wagering from other policies, there would be a great disadvantage to underwriters; on a wagering policy, there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost, but it is the contrary on a policy on interest; there is salvage, there is an abandonment, there is a return of premium for short interest; there it is usually the interest of the merchant to labor for the safety of the vessel; consequently it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know that it is a wagering policy." * This reasoning does not apply to life insurance, in which the extent of the insurer's liability is ascertained and uniform, and if the company receive their premium, the interest of the assured on the life is to them a matter of indifference. In *Godsall v. Boldero*,² the declaration expressly averred that the plaintiffs at the time of effecting the policy, and from thence until the death of Mr. Pitt, were interested in his life to the amount of the sum insured; and that averment was necessary to take the case out of the prohibition contained in the 14 Geo. 3, Eng. c. 48. There is no corresponding statute in Ireland; and it is clearly established by adjudged cases, as well as by the language of the statute itself, that wagering policies upon lives were legal in England before the statute, and, therefore, are still in Ireland. That statute is clearly enacting; it does not profess to remove doubts as to the existing law, but on the contrary it recites, that "it hath been found by experience that the making insurance on lives or other events, hath introduced a mischievous kind of gambling, for remedy whereof" it enacts a prospective prohibition; and in *Cousins v. Nantes*,³ "the court consider it to have been solemnly determined by the case of *Lucena v. Craufurd*,⁴ without even a difference of opinion among the judges, that at common law wager policies, or insurances without interest, were legal." But even if, as is contended, this policy import an interest, as the declaration sets it forth in its terms, and therefore according to its legal effect, the declaration also imports an interest which it would be sufficient to prove at the trial. *Cohen v. Hannam*,⁵ per Chamber, J.: "Unless I am very much mistaken, in *Lucena v. Craufurd*, and in some other cases since the statute 19 Geo. 2, c. 37, it has been held unnecessary to aver interest, and sufficient to show at the trial that there is an interest;" and even though the plaintiff should fail to prove an interest to the extent of the sum demanded, he would be entitled to have judgment to the extent of the interest

¹ 3 Taunt. 513.² 9 East, 72.³ 3 Taunt. 513.⁴ 3 B. & P. 101; S. C. 3 N. R. 269; 1 Taunt. 325.⁵ 5 Taunt. 106.

Schweiger v. Magee.

proved, and to enter a *remittitur* for the residue. *Inclendon v. Crips*.¹ The objection that such insurances might ultimately involve the feelings of third persons would, as was observed by the lord chief baron, equally apply to insurances upon interest. In these countries the fear of the law is considered quite sufficient to countervail the temptation to assassination.² Besides, insurances are usually effected upon the lives of insolvent debtors, and the temptation to get rid of them would be as strong as in any other case.

Cur. adv. vult.

BUSHE, C. J., delivered the judgment of the court.³ This writ of error has been brought to reverse the judgment of the court of exchequer, in an action of debt on a policy of insurance for £500 upon a life, in which the declaration does not state that the plaintiff below had any interest in the life insured, nor does the policy, which is set out on oyer, contain such a statement. The defendant below pleaded three pleas, insisting that the plaintiff had not any interest in the life insured, upon which pleas issue had been joined, and three other pleas, insisting that the plaintiffs had not any interest to the amount of £500 at the time of executing the policy, or at the death of the life; and another plea stating, that the plaintiff was not damnified by the death to the extent of £500. To these last four pleas the plaintiff demurred generally, and the court of exchequer having allowed the demurrers, this writ of error is brought to reverse the judgment. The plaintiffs in error have not insisted in argument that the pleas demurred to are good; on the contrary, the note in the paper books confines their case to an attack on the declaration, and accordingly they have only contended that the declaration ought to be held bad on general demurrer, inasmuch as it does not allege that the plaintiff below had any interest in the life insured, in support of which they have relied on the case of *Godsall v. Boldero*,⁴ as deciding that a policy on a life insurance is a mere contract of indemnity, upon which the plaintiff below can only recover to the extent of his loss sustained by the death of the life insured; therefore, that he must have an interest in that life. The counsel for the defendant in error in the first place contended that if it were necessary for the plaintiff to show an interest, his interest sufficiently appears upon the declaration and policy, and that it was not necessary to allege it more particularly, as from the nature of the policy it is to be implied; and secondly, they argued that an insurance on a life is a wagering policy, not falling within that class of cases, in which certain insurances might be condemned by the common law on the ground of policy or morals, and that in Ireland no such statute has been enacted as the 14 Geo. 3, c. 48, which in England has prohibited such insurances, unless in cases where the party insuring has an interest. This latter argument has been encountered by an allegation that the insurance is illegal at common law independently of statute, and that the 14 Geo. 3, c. 48, Eng. was merely declaratory of the common law. However, that has not been sus-

¹ 2 Salk. 659; *S. C.* 7 Mod. 87; 2 Ld. Ray. 814; and see also *Duppa v. Mayo*, 1 Wms. Saund. 285 a, note 6.

² Per Lord Ellenborough, *Gilbert v. Sykes*, 16 East, 155.

³ Smith, B., Pennefather, B., and Vandeleur, J., were absent.

⁴ 9 East, 72.

M'Cormick v. Ferrier.

tained, for no authority has been cited to show that such an insurance has been held illegal, as being against policy or morals, in any case decided in England before the statute; and it is only necessary to look into the statute to be satisfied that it is not declaratory, for it does not recite any existing doubt, or prevailing mistake as to the law, but on the contrary recites, "that making insurance on lives or other events in which the assured shall have no interest, has been found by *experience* to have introduced a mischievous kind of gaming; "that from and after the passing of this act no insurance shall be made in which the insured shall have no interest;" thus recognizing the frequency of the practice and the necessity for preventing it in future. The court are therefore unanimously of opinion that the judgment of the court of exchequer must be affirmed with reasonable costs. *Judgment affirmed.*

M'CORMICK *et al.* vs. FERRIER *et al.*, Directors of the National Insurance Co.

(Hayes & J. 12. Exchequer, 1832.)

Usury. — A, by deed reciting that certain premises were worth £20 a year, granted to B an annuity of £20 for thirty years, charged upon the premises, which he covenanted to be of the recited value. A proviso was added that so soon as the grantor should pay the consideration money, with legal interest and costs, the deed should be void. *Held*, that the judge was correct in leaving to the jury the question of usury.

Insurable interest. — In an action on a policy of life insurance, effected by two persons, separate interests may be proved.

ASSUMPSIT on a policy of insurance. The policy bore date in February, 1824, and purported to be made at the instance of the plaintiffs, Thomas M'Cormick and Denis M'Cormick, for the purpose of insuring £600, late currency, to be payable at the decease of Barnaby O'Connor, in whose life the said Thomas and Denis had an interest, in case he should die within seven years from the date of the policy. It contained a proviso that if anything averred by the assured in the declaration mentioned to have been made by them should be untrue, or if the interest of the assured in the life of Barnaby O'Connor should cease or determine, the policy should be void. O'Connor died in November, 1830. The trial took place before Pennefather, B., at the assizes held for the city of Limerick, in the summer of 1831, when the plaintiffs, in proof of their interest, submitted the following evidence: 1. A deed of the 19th of August, 1822, made between Barnaby O'Connor of the first part, Thomas M'Cormick of the second part, and Denis M'Cormick of the third part, whereby, in consideration of £300, late currency, an annuity of £34 18s.,

charged on the mill and lands of Kilbane, in the County of Clare, was granted by B. O'Connor to Thomas M'Cormick, for the life of John O'Connor, then aged twelve years. The covenant to pay the annuity was made with Thomas M'Cormick; to whom also powers of distress and reëntury were given, in case of non-payment. The premises were conveyed to Denis M'Cormick, to hold for ninety years, provided John O'Connor should so long live, as trustee, to secure the payment of the annuity. It was also proved that one and a half year's arrears of this annuity were due at the time of effecting the insurance. 2. A deed of 1st June, 1822, made between B. O'Connor of the one part, and Denis M'Cormick of the other part; by which, in consideration of £99 4s., B. O'Connor granted to D. M'Cormick an annuity of £20, to be issuing out of and chargeable upon four houses in Upper Clare Street, Limerick, which were recited to be of that yearly value, at the least; to hold the said annuity from the first of May then last, for the term of thirty years thenceforward, the same to be paid and payable by half yearly payments. There was then a power of distress, in case it should be unpaid for twenty-one days, and covenants that the premises were worth £20 a year, for title, and against incumbrances. After which came the following: "Provided nevertheless, and it is the true intent and meaning hereof, that so soon as the said B. O'Connor, his executors, &c., shall well and truly satisfy, content, and pay, or cause to be paid, &c., to the said D. M'Cormick, his executors, &c., the said sum of £99 4s. with the lawful interest thereof, and all such costs as the said D. M'Cormick, his executors, &c., shall be put to, (if any,) in enforcing said annuity of £20, this deed or grant to be frustrated, null, and void, to all intents and purposes whatsoever." An attornment of the tenants was indorsed on the deed. 3. A promissory note for £50, bearing date the 8th of August, 1822, made by B. O'Connor to one Vaughn, and by him indorsed in blank. 4. An I. O. U. by O'Connor to Thomas M'Cormick, for £38 3s. 5d., dated the 21st of November, 1821. 5. An I. O. U. by O'Connor to Denis M'Cormick for £39 16s. 3d., bearing date the 4th of January, 1822. 6. An I. O. U. by O'Connor to D. M'Cormick, for £20, dated the 16th of June, 1822. The learned baron, in charging the jury, told them that even though it were necessary to prove a joint interest in the plaintiffs, that had been sufficiently done under the first

deed of annuity ; that the promissory note having been indorsed in blank, and not having been due at the time of the annuity granted, might be regarded as a good joint interest to that extent, in addition to that given by the annuity deed ; that the I. O. U.'s gave an interest to each party respectively sufficient to support the claim under the policy, provided the sums mentioned in them were *bonâ fide* due, and not involved in the annuity deeds ; that the deed of June, 1822, seemed to him objectionable, on the ground of usury, but he left it to the jury ; and also left it to them to find a specific sum, as the value of the annuity granted by that deed. A verdict was found for £553 16s. 11d., the full amount of the policy, of which sum £100 were allocated as the value of the last mentioned annuity. The learned baron having given the defendants leave to move to have the verdict reduced.

G. Bennett, for the defendant, moved that the verdict should be set aside, as being against law and evidence, and for misdirection of the learned judge ; or that it should be reduced by £100, or such other sum as the court should think fit. The plaintiffs have declared to the company that they had an interest in the life, by which must be understood a joint interest. Now, as to the deed of August, 1822, they have no joint interest whatever. The interest of Thomas alone is beneficial ; while that of Denis is merely as trustee of a term to secure the annuity. The consideration moved altogether from Thomas, and the covenant to pay was made with him alone. In the deed of June, 1822, Thomas M'Cormick claims no interest whatever. In *Bell v. Ansley*,¹ it has been held that joint owners of property insured cannot recover upon a count on the policy averring the interest to be in one of them only. The same principle, viz. : that the interest must be truly stated in the declaration, ought to govern this case, which is its converse. Besides, the deed of June, 1822, is void for usury ; and all the I. O. U.'s are barred by the statute of limitations.

H. Cooper & W. E. Hudson, contra. The last objection cannot prevail ; for, although the statute of limitations may bar the remedy, it does not bar the debt *in foro conscientiæ*, nor is a man obliged to avail himself of its provisions to get rid of his debts. In order to bring the deed of June, 1822, within the statutes

¹ 16 East, 141.

against usury,¹ there must have been a loan (3 Inst. 151) and a corrupt bargain between the parties for the repayment of it, with more than legal interest. *Tanfield v. Finch*,² *Fountain v. Grymes*,³ *Chesterfield v. Janssen*.⁴ In the present case, the deed has been most inartificially drawn; but a party shall not suffer for the mistake of his scrivener; *Murray v. Harding*;⁵ especially when it is easy to collect from its whole tenor what were the intentions of the parties, viz.: that the grantee should be let into the receipt of the rents, and should continue to receive them, until paid the amount advanced, with legal interest. The whole question upon this deed is, whether it was a cover for a loan of money, which was a question for the jury; *Doe d. Metcalf v. Brown*;⁶ and has been found for the plaintiffs. The case appears to be governed by that of *The King v. Drury*.⁷ A joint interest has not been averred in the declaration, but merely an interest generally. The case of *Bell v. Ansley*,⁸ therefore, does not apply; for there the interest was positively averred to be sole; and the variance between the averment and proof was held to be fatal. There can be no objection to one of the plaintiffs being only a trustee in the deed of August, 1822: for agents and trustees are, of themselves, fully competent to effect insurances, *Craufurd v. Hunter*.⁹ At all events, the right to recover upon the promissory note is quite clear. It was indorsed in blank, and coming out of the hands of the attorney of both the plaintiffs, their interest in that must be presumed to be just. An interest then being shown, there is no objection to the plaintiffs holding their verdict for the full amount, as was intimated by this court in *Shannon v. Nugent*.¹⁰ [PENNEFATHER, B. We said nothing in *Shannon v. Nugent* which would touch this case. The mention of interest in the policy shows that it is to be a contract of indemnity. — JOY, C. B. The reason and ground of the contract is, the party's having an interest in the life. Does it not then follow that the contract shall be coextensive with the interest?]

J. D. Jackson, in reply. There is no doubt that wagering life policies in Ireland are lawful; but if the parties choose, as in this case, to insure upon interest, it is quite competent to do so; and

¹ See 5 Geo. 2, c. 7.² Cro. El. 27; 1 Anders. 121.³ Cro. Jac. 252.⁴ 1 Atk. 301, 340.⁵ 2 Bl. 859.⁶ Holt, N. P. 295.⁷ 2 Lev. 7.⁸ 16 East, 141.⁹ 8 T. R. 13.¹⁰ Ante, p. 327.

their contract becomes then a contract of indemnity. In *Shannon v. Nugent* nothing was said about interest, either in the policy, the pleadings, or evidence; and it cannot at all apply here. The interest averred must, upon the plain intendment of the words, be taken to mean a joint interest; an interest in each, if not equal, at least pervading the entire. *Page v. Fry*.¹ Had the averment been, that A and B were seised of lands, they would have been bound to show a joint seisin. It is not dealing fairly with the insurers to withhold from them the real state of the facts, which ought at all events to be put forward in the declaration. *Cohen v. Hannam*.² Upon the authority of *Fereday v. Wightwick*,³ the deed of June, 1822, is clearly usurious; and the circumstance of the annuities being charged on land, which did not occur in that case, seems only to make the usury more gross, by making the return of the principal and legal interest more certain. The cases cited on the other side are all old. In the present day, the doctrine of usury, and the contrivances of usurers are better understood; and courts of equity have wisely reserved to themselves the discretion of shaping their decisions according to each particular case, without laying down unbending rules. *Lawley v. Hooper*.⁴ In *Byrne v. Kennifeck*,⁵ which was a grant of a life annuity with, and insurance of, the grantor's life, it was properly left to the jury to say whether the agreement was really for an annuity, or a corrupt cloak for a loan. But in the present case, where there is a grant of an annuity for years, with a covenant by the grantor that the premises charged are of the annual value of £20, which is tantamount to a covenant to pay the annuity of £20, there can be no doubt of the corrupt agreement; and the learned baron, instead of submitting that question to the jury, ought to have altogether withdrawn the deed from their consideration.

Cur. adv. vult.

JOY, C. B. pronounced judgment. This was a motion to set aside the verdict, as being against law and evidence, and for a new trial; or else, to reduce the amount of the sum given by the verdict. The action has been brought upon a policy of insurance effected by the plaintiffs jointly for £600, late currency. The policy states that the plaintiffs had an interest to the extent of £600 in the

¹ 2 B. & P. 240.

³ 1 Russ. & Myl. 45.

⁴ 3 Atk. 278.

² 5 Taunt. 101.

⁵ Batty, 269.

life of Barnaby O'Connor, which they insured to that amount. The separate interest which each had is not specified. The company did not inquire into that; but insured the life, allowing the plaintiffs to arrange the proportions as they please. Now, the defendants object that the plaintiffs gave no legal or satisfactory evidence of interest. If the jury considered the contract as one of indemnity, the plaintiffs have not received more than they were entitled to, on the abstract principles of justice; and the verdict is right, provided there was no usury in the transaction out of which the interest arose. It has been urged that the verdict is against law, because the interest insured was a joint interest; and that proved was a separate interest; and that the judge was in error in admitting the evidence. But supposing that the interest must be joint, the action was still maintainable, because it is admitted that there was a joint interest, as far at least as £50. Then the question is, Has justice been done? The averment is, that the plaintiff had an interest, not specifying an entire interest in one, as in *Bell v. Ansley*,¹ and *Cohen v. Hannam*.² The policy was effected for both; the defendants have not been obliged to pay more than they ought; the plaintiffs have not received more than they were entitled to; and the defendants undertook that they should receive so much. The defendants, also, have not been able to show any authority that distinct and separate interests cannot be insured in one policy. There is a negative proof established by the schedule to the 38 Geo. 3, c. 18, that separate interests may be jointly insured. We are therefore of opinion that the verdict ought not to be disturbed on this action.

Upon the deed of June, 1822, a very nice question arises as to usury. It is very untechnically drawn. It professes to dispose of a profit rent of houses; but it is difficult to ascertain whether it is a sale of a profit rent or the grant of an annuity; and the question is, whether, by this means, more than legal interest has been contracted to be paid for the loan. The whole rent to which the premises are subject appears to be £20 a year. There is an attornment of the tenants, agreeing to pay rent to that amount; and there is a covenant that the premises should produce £20 *per annum*. This is strong, to show usury, according to the case of *Doe d. Titford v. Chambers*.³ There is another clause, which is very

¹ 16 East, 141.² 5 Taunt. 101.³ 4 Camp. 1.

 Bennett v. Anderson.

obscure, and occasions great difficulty, from the double construction which it is capable of receiving. The clause is: "Provided, nevertheless, and it is the true intent and meaning hereof, that so soon as the said B. O'Connor, his executors, &c., shall well and truly satisfy, &c., or cause, &c., to the said D. M'Cormick, his executors, &c., the said sum of £99 4s., with the lawful interest thereof, and all such costs as the said D. M'Cormick, his executors, &c., shall be put to (if any) in enforcing said annuity of £20, this deed or grant to be frustrated, null, and void, to all intents and purposes whatsoever." If it be meant that the sums received should be taken into account, the deed would not be usurious; but if he were to hold all the rents received, and be paid the entire principal sums besides, it would be usury. With respect to this question, had I tried the case, I would have done as the learned judge did who tried it; that is, I should have left the question upon the deed to the jury. We are therefore of opinion that the verdict ought not to be set aside, nor the amount reduced, — as the action was maintainable, and justice has been done.

Motion refused, without costs.

 BENNETT vs. ANDERSON.

(1 Irish Jur. (Reports,) 245. Queen's Bench, 1849.)

Materiality. Court and jury. — Assumpsit on three several policies of assurance on life; each of them contained a provision declaring that it should be void "if anything stated by the assured, either in the declaration or attestation therein before mentioned to have been made by him should not be true." The proposal for insurance contained the following particular: "Has the party's life been accepted or refused at any other office, and if accepted was it at the usual premium or with what addition?" The answer returned by the assured was, "Asylum and National Office, at the usual premium." The following agreement appeared at the foot of the proposal, and was signed by the assured: "I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void." The defendant proved at the trial that the assured had proposed the same party's life for insurance at two other offices, previous to effecting the insurance with the defendant's company, and that his proposal was rejected. The judge, in summing up, stated to the jury, that it was for them to say whether there had been a concealment by the assured of any circumstance which was material for the company to know. *Held*, that this was a misdirection, for that the assured had contracted with the defendant's company that the several matters contained in the proposal should be answered truly, and consequently that the question, whether an answer given was more or less material, was not open to him.

ASSUMPSIT by the plaintiff, as administrator of Humphrey Palmer, deceased, against the defendant, sued as one of the direc-

tors of the Union Kingdom Life Assurance Company, on three policies of assurance on the life of the deceased, amounting to £1,200, dated respectively the 2d of September, 1840. Each of the policies contained the following recital: "Whereas H. Palmer is desirous of making an insurance upon his own life, and has declared that he, the said H. Palmer, did not exceed the age of thirty-four years on the 22d of August, 1840, has had the small-pox, has not had gout, has not suffered a spitting of blood, and is not affected with any disorder which tends to shorten life, and that he has led and continues to lead a temperate life." One of the terms of the policies was, that they should be void "if anything stated by the assured, either in the declaration or attestation therein before mentioned to have been made by him, should not be true." The proposal for insurance contained particulars to be filled up, signed, and witnessed; and one of these particulars was as follows: "Has the party's life been accepted or refused at any other office, and if accepted, was it at the usual premium, or with what addition?" The answer returned to this question was, "Asylum and National Office, at the usual premium."

The plaintiff was the party who proposed the life for insurance, and the following agreement, appearing at the foot of the proposal, was signed by him: "I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void."

The declaration set forth the three policies and conditions of assurance annexed, and averred, in the usual manner, that all the conditions of the policies had been complied with.

The declaration also contained the money counts, and the defendant pleaded the general issue.

On the trial of the cause before the lord chief justice, at the sittings after Michaelmas term, 1848, it appeared from the defendant's evidence, that the plaintiff, previous to effecting the insurance with the defendant's company, had proposed H. Palmer's life for insurance at two other offices, and that his proposal was rejected by them. The defendant's counsel thereupon submitted that this was a fact which should have been communicated to the

defendant's company by the plaintiff, when answering the particulars, and that the not doing so amounted to a fraudulent concealment on his part, and rendered the policy void.

The lord chief justice left it to the jury to say whether there had been a concealment of any circumstance which it was material for the company to know. The jury found that there was no concealment of any material circumstance, and gave their verdict for the plaintiff, for the amount of the sum insured.

On a former day in this term,

Mr. *Martley*, Q. C., moved for and obtained a rule *nisi* for a new trial, on the ground of misdirection of the lord chief justice, and that the verdict was against law and against evidence.

Mr. *Brewster*, Q. C., (with him Mr. *Fitzgibbon*, Q. C.,) now showed cause. The question is, whether the declaration is so incorporated with the policy as to make it matter of warranty. The present case is distinguishable from *Scanlon v. Sceales*, 6 Irish L. Rep. 367, and from *Geach v. Ingall*, 14 M. & W. 95; for in these cases the declaration, being distinctly referred to, was considered as embodied in the policy, and to have thereby become a part of it, and, consequently, matter of warranty; but in the present case the policy does not refer to any instrument; and to import into a contract a document which is not referred to, is a violation of the statute of frauds and contrary to the general principles of the law. Regarding the declaration as matter of representation the question of materiality was for the jury.

Mr. *Martley*, Q. C., & Mr. *George*, Q. C., for the defendant. The question is whether there is sufficient reference in the policy to a declaration, to enable the defendant to give in evidence what that declaration is. The policy is only signed by one of the parties, and we are entitled to read the words in the policy, "has declared," as saying that Palmer "has made a declaration." The principle established in *Scanlon v. Sceales* is, that if the document is referred to, it forms part of the policy, and we submit there is enough to identify the declaration with the policy. It was material that the defendant should have known that the insured was rejected by another office six weeks before he applied to be insured in the defendant's office.

Mr. *Fitzgibbon*, Q. C., in reply. The policy commences by declaring that H. Palmer did not exceed the age of thirty-four years, has had the small-pox, has not had the gout, &c. Here is

Bennett v. Anderson.

a statement of facts, which, if true, would make Palmer's life an insurable one, and all the other questions are put with the view of testing the accuracy of the former answer. What is intended to be made warranty is extracted from the statement or declaration, and it is only reasonable and just for the company to stipulate that those matters which go to make an insurable life should be made matter of warranty; but it would be unreasonable for them to require that matters no way affecting this question should also be made warranty. The policy says if the allegations are not true, it is to be void; but the declaration has the words "fraudulent concealment," which is a question for the jury. The fallacy on the other side is in supposing that the attestation in the policy means a proper attestation, and not an act. We contend that the policy refers to a verbal statement, and not to the written statement and declaration. In *Scanlon v. Sceales* there was an express reference to a written declaration; and in *Geach v. Ingall* the judge narrowed the question too much.

BLACKBURNE, C. J. We are of opinion that I was wrong in leaving the question of materiality to the jury. The verdict, therefore, which was anything but satisfactory, must be set aside without costs, and without costs of this motion. It is plain, whether the written declaration be incorporated in the policy or not, there was a conditional stipulation on the part of the company that the various matters in the proposal should form the basis of the contract between the assured and the company, and both parties contracted that those several matters should be answered truly.

CRAMPTON, J. I am of opinion, unless we overrule *Scanlon v. Sceales*, followed by *Geach v. Ingall*, we must hold that the written declaration is incorporated in the policies, and is thereby made matter of warranty, and not of representation.

PERRIN, J. I do not wish to give a decided opinion as to the meaning of the words in the policy; it involves the true construction of the instruments, how far the one refers to the other; but having regard to the terms of the proposal, and the agreement at the foot of it, I take them, as in every other contract would be implied, as containing this provision, namely, that "I have given these answers upon the terms that they shall form the basis of the contract between the assured and the company; and if there be contained therein any fraudulent concealment, or un-

Rose v. Star Insurance Company.

true allegation, I shall have no right of action." 'I do not think it is open to the party afterwards to say, that the answer given is more or less material. In my opinion, he bound himself to answer truly.

MOORE, J. I do not desire to express my opinion as to whether this declaration is incorporated in the policy or not; if it be incorporated, it amounts to warranty. My impression is, that it is not. In both the cases which have been referred to, there was a clear reference in the policy to the declaration. *Rule absolute.*

ROSE vs. STAR INSURANCE COMPANY.

(2 Irish Jur. (Reports,) 206. Exchequer, 1850.)

Construction. Disease shortening life. Referees. — Where a declaration on which a policy is grounded states that the person about being insured has no diseases or habits having a tendency to shorten life, the omission to mention a disease not having a continuing tendency to shorten life does not render the policy void.

The answers of persons to whom an insurance company may be referred for information are binding only so far as it was agreed that they should be questioned.

THIS was an action on a policy of insurance; there were several pleas to the declaration, of which the third, seventh, and eighth only are important. The insurance was effected in the year 1844, on the life of Mr. Marony. Before the insurance was effected, the company required a declaration that Mr. Marony was in good health, was not afflicted with gout, cough, or fits, since infancy, and had not any other diseases, ailments, or habits having a tendency to shorten life. This declaration was the basis of the contract. The company also required certain references; one of which was to the usual medical attendant of the party whose life it was sought to insure; or if there was no usual medical attendant, then to two private friends. In this case, Mr. Marony stated he had no medical attendant, and named two private friends, who, on being referred to, represented Mr. Marony as a person of sober and temperate habits. The evidence was that Marony was not a temperate person; on the contrary, that he was drunken. It further appeared in evidence that Mr. Marony had, in 1841, an ailment in his throat, for which he was obliged to undergo a dangerous and painful operation. And the evidence of Surgeon O'Brien was, that at that time his life was

seriously endangered. The questions which were argued on the defence raised by the pleas are fully stated in the judgment of the court.

J. D. Fitzgerald, Q. C., with *Brereton*, moved to make absolute the conditional order to set aside the verdict had for the plaintiff in this case, at the last summer assizes for the County of Clare, on account of the misdirection of the learned judge, and the rejection of legal evidence. In *Geach v. Ingall*, 14 Mee. & Welsb. 95, it was held that a person insuring was bound to communicate to the company such a fact as having once spit blood. As to the habits of Mr. Marony there was clearly misrepresentation. He referred the company to two persons, whom he called his private friends, — one of them his trustee, and the other his solicitor, — who represented him as sober and temperate. He was bound by that representation. In *Southcombe v. Merriman*, Carr. & Marsh. 286, it was held that an insurance company might make what rules it pleased, and might stipulate that any person insured by them should be of temperate habits; and that it was not necessary his intemperance should be of such a character as to endanger his health. Mr. Marony himself, though he answers very cautiously, must be held as bound by the declaration of the private friends. His declaration was on a printed form, containing a general declaration, and which was a form similar to that on which the declaration of the private friends was made. All intemperate habits have a tendency to shorten life. The qualification, “tendency to shorten life,” is confined to habits, and cannot be taken to control the whole sentence. It would be absurd to extend it to gout, consumption, and the others. The judge told the jury that the defendant had failed to establish that Mr. Marony was afflicted with any disease having a tendency to shorten life; and as to intemperance, that they should be satisfied he was addicted to such habits as had a tendency to shorten life. To this direction of the learned judge he had objected, and now claimed to have the verdict set aside on the ground of misdirection. He did not press the objection as to the rejection of evidence.

Lane, Q. C., and Sir *Colman O’Loughlen*, in support of the verdict. The 8th plea avers that the policy was attained by the misrepresentation of the plaintiff. The question was, “Are the habits of Mr. Marony sober and temperate?” The answer was, “I am not aware but that they are.” That answer is sufficiently

cautious. In *Chattock v. Shawe*, 1 Moody & Robinson, 498,¹ it was held that to vacate a policy it must be shown that the constitution of the assured was naturally liable to fits, or by accident had become so. The case of *Geach v. Ingall* does not apply. Spitting of blood was not like a casual illness, from which one might entirely recover; it might give cause for an apprehension of disease in the lungs, and should not have been concealed from the company. The plaintiff cannot be held bound by the answers of the private friends. They were referred to by the proposal to reply to certain limited questions; they were asked much more. The answers were not communicated to the plaintiff.

PENNEFATHER, B. This action is brought by Mr. Henry Rose against Thomas Vanner and others, representing the Star Insurance Company, for a sum secured on an insurance effected in 1844, on the life of Mr. Marony. The declaration states the policy in the usual manner. There were several special pleas on the part of the defendant, of which three, the 3d, 7th, 8th, are relied on. Of these the 7th is put out of the way, by showing that no such statement as that averred in the 7th plea was made by the plaintiff. The 3d plea avers that a declaration was made by the plaintiff, and that this declaration was not true in all its parts. Here we must consider the exact words of the policy; and that clause particularly as to the construction of which we have heard so much argument. The policy contains an allegation that Mr. Marony was not afflicted with gout, cough, &c., or fits since infancy; and had not any other ailments, diseases, or habits having a tendency to shorten life. It was said that in 1841 he was afflicted with a disorder which endangered his life, and that he was bound to inform the company of it. The words, "tendency to shorten life," must be connected with "ailments," as well as with "habits," as otherwise it would be impossible to effect any insurance whatsoever. The clause mentions gout, cough, and other disorders, all of a continuing character. The word "infancy" applies to fits and disorders of that description, because infants are peculiarly liable to those ailments. As to the others they have all a continuing tendency to shorten life, and are therefore mentioned particularly to avoid disputes afterwards. The company say, we will not insure any persons who have had these diseases, or any diseases having the same continuing character,

¹ *Ante*, p. 10.

and thus exclude from the category of excepted diseases all those which have no continuing tendency to shorten life. If the true construction is, that the disease should have a continuing tendency to shorten life, — if that is the construction which can be collected from other diseases enumerated, — then this ailment in the throat is not a disease within the meaning of this policy, as having a tendency to shorten life; if this is the true construction, then there is no averment, within the meaning of this policy, made by the plaintiff, which was untrue. This disposes of the 3d plea, and leaves only the 8th. The private friends reported that Marony was a temperate person, and the judge was called on to direct a verdict for the defendant if the jury believed that Marony was not a temperate person, even if they did not believe his intemperance was such as had a tendency to shorten life. We must now consider whether the plaintiff was bound by the statement of the private friends that Marony was a person of temperate habits. The plaintiff himself replies very cautiously, and does not answer directly; but it is said that he authorized others, and was bound by the answers of the persons he had named. He was only bound by their replies so far as he agreed questions should be submitted to them, — namely, as to the state of his health; and so far as they went beyond this, they gave their answer not under the authority of the plaintiff, and so far may be considered as strangers. It is further said that the plaintiff is to be bound, and must be considered as having given authority, because he signed a printed paper in the same form as that signed by the private friends. The printed paper he signed he filled cautiously; and it is said, that because that paper had the same form with the other he must be bound by that other. He can't be bound by a paper he never saw, nor gave any authority to sign. It is said he is bound by the general words in the printed paper signed by him, "That if, in the declaration, or in any paper furnished by me, there be contained any fraudulent matter, the policy should be void." And it is contended that by reason of these general words, and the paper having been furnished before the completion of the contract, the policy was void. It would be monstrous, considering that this is the paper of the company, to give it a construction adverse to common sense. If this be so, what security would there be for any person insuring? The paper should have been furnished by him, or by his authority. The motion should be refused, and with costs.

Armstrong v. Turquand.

RICHARDS, B. Unless in the case of personation, it is most unjust to allow a company to disturb insurance after having taken the money of the party. The parties insuring are frequently country gentlemen, ladies, and other persons, knowing nothing about the law. The papers are generally filled in the office of the company, and signed merely as a matter of form.

LEFROY, B. On all points my brother Pennefather has said so much and so well, it would be a waste of time to say anything more. The documents seem to be so framed that one part should do away with the effect of the other, and calculated to turn what might be representation into warranty with all its consequences.

Motion refused with costs.

ARMSTRONG vs. TURQUAND, Official Manager of the Deposit and General Life Assurance Company.

(9 Irish C. L. 32. Common Pleas, 1857.)

Concealment. Waiver. — To an action brought by the administratrix of a party who had effected a policy upon his own life in the D. & G. Assurance Co., which policy contained a proviso that in case the said assured had been guilty of fraud in procuring it, &c., the policy should be void, and all moneys paid in respect of it should be forfeited to the company, the latter pleaded that the party assured had, at the time of effecting the policy, in conjunction with the agent of the company, fraudulently concealed the fact of his having met with an accident, from the effects of which he was then suffering paralysis, and had withheld all knowledge from the company of the uninsurability of his life. The plaintiff replied that the company, after they had knowledge of the facts pleaded, received a second premium from the insured, and thereby elected to affirm the policy. *Held*, upon demurrer to the replication, (MONAHAN, C. J., *dissentiente*.) that the meaning of the proviso was that the policy should be void in the particular event in case the company should elect to treat it so; and that inasmuch as they had elected to treat it as subsisting by the receipt of the subsequent premium, they were liable for the amount.

THIS was an action brought by the plaintiff, as administratrix of Denis Armstrong, deceased, against the defendant, as the official manager of the Deposit and General Life Assurance Company, upon a policy under seal, dated the 17th of December, 1852, for the sum of £999 19s., effected with said company by and upon the life of Denis Armstrong, who died upon the 28th of August, 1854. The summons and plaint was in the usual form.

The defendant pleaded, first, that in and by said policy it was provided that the said policy was upon the express condition that, in case the said assured had been guilty of fraud in procuring the said policy, the said policy should be void, and all moneys paid in respect thereof should be forfeited to the company; that one

Patrick Walsh was the person who proposed to the company for the said policy on behalf of the said Denis Armstrong, and was the general agent of the said Denis Armstrong in and about the obtaining the said policy from the company; that before the time for the proposing of the said policy, the said Denis Armstrong had, for the purpose of effecting an insurance on his life, furnished to the Medical, Legal, and General Mutual Life Assurance Society a declaration, in writing, dated the 13th day of November, 1852, containing, amongst other things, a statement that the said Denis Armstrong had never had any accident requiring confinement, and a statement that the said Denis Armstrong was enjoying good health; that the said Denis Armstrong, before the time of the proposing for the said policy, had been examined for the purpose of insurance by the medical referee of the said Medical, Legal, and General Mutual Life Assurance Society; that the said Denis Armstrong had been and was guilty of fraud in procuring the said policy, in this: that the said Patrick Walsh (being such general agent as aforesaid) fraudulently induced the company to believe that the said statements respectively were truly applicable to and correctly represented the condition of the said Denis Armstrong as it existed at the time of the proposing for the said policy; whereas the said Denis Armstrong had, at that time, had an accident requiring confinement, and at that very time was confined by the said accident, as the said Denis Armstrong and Patrick Walsh well knew; and whereas the said Denis Armstrong was at that very time suffering from paralysis, as the said Denis Armstrong and Patrick Walsh well knew; and further, in this, that the said Patrick Walsh, at the time of proposing for the said policy, fraudulently represented to the company, and induced them to believe, that no material change had at that time taken place in the state of the said Denis Armstrong's health since the said Denis Armstrong had been so examined as aforesaid by the said medical referee of the said Medical, Legal, and General Mutual Life Assurance Society; whereas a material change, caused by an accident, had at that time taken place in the said Denis Armstrong's state of health, since he had been so examined, as the said Denis Armstrong and Patrick Walsh well knew; and whereas a material change, caused by an attack of paralysis, had at that time taken place in the said Denis Armstrong's state of health, since he had been so examined, as the said Denis Arm-

strong and Patrick Walsh well knew ; and further, in this, that the said Denis Armstrong had within a short time, to wit, less than a week before the time of the proposing for the said policy, met with an accident of a serious and material character, from the effects of which he was suffering at the respective times of the proposing for and the making of the said policy, as the said Denis Armstrong and Patrick Walsh, at the said respective times, well knew ; and the said Denis Armstrong and Patrick Walsh fraudulently concealed this fact, and withheld all information respecting said accident from the company ; and further, in this, that the said Denis Armstrong had, a short time, to wit, less than one week before the time of the proposing for the said policy, been seized with an attack of paralysis, from which, at the said last mentioned time, and at the time of the making of the said policy, the said Denis Armstrong was suffering, as the said Denis Armstrong and Patrick Walsh, at the said times respectively, well knew ; and the said Denis Armstrong and Patrick Walsh fraudulently concealed this fact, and withheld all information respecting the said attack of paralysis from the company ; and further, that at the time of the proposing for the said policy, and at the time of the making of the said policy, the said Denis Armstrong was in such a state of health that his life was not insurable at the premium made payable by the said policy (being the ordinary rate of premium), as the said Denis Armstrong and Patrick Walsh, at the said respective times, well knew, and the said Denis Armstrong and Patrick Walsh fraudulently concealed that fact, and withheld all knowledge respecting such insurability of the said Denis Armstrong's life from the company ; and further, that at the respective times of the proposing for and the making of the said policy, the said Denis Armstrong was in such a state of health that his life was wholly uninsurable, as the said Denis Armstrong and Patrick Walsh, at the said respective times, well knew ; and the said Denis Armstrong and Patrick Walsh concealed that fact, and withheld all knowledge respecting such uninsurability of the said Denis Armstrong's life from the company.

The second defence was to the effect that one Patrick Walsh was really the person assured, and averred fraud on the part of said Walsh as before imputed to Armstrong.

The third defence was to the effect that Armstrong had met

with an accident, which materially affected the risk, and that Walsh and Armstrong knew of the accident, and did not communicate it.

The fourth defence was, that Armstrong had attacks of paralysis, as he and Walsh knew ; that such attacks were material to the risk, and were not communicated.

The fifth defence was, that the policy was obtained through fraud and covin.

The plaintiff replied to the first defence, that the company afterwards, and before the second premium upon said policy became due, discovered and were made acquainted with the frauds in said defence mentioned ; but they did not, on discovering and becoming so acquainted with said frauds, at any time afterwards during the lifetime of the said Denis Armstrong, disaffirm and avoid said policy, but affirmed and elected to hold the same, and, in the lifetime of the said Denis Armstrong, received the said premium subsequently becoming due thereon, after having so discovered and been made acquainted with said frauds.

The plaintiff replied similarly in substance to each of the other defences before referred to.

The defendant demurred to each of the replications ; assigning as causes of demurrer that the replications did not disclose any ground of reply good in substance, because they relied on and alleged an affirmation of a void contract, without showing any reëxecution of the policy, or showing any new binding contract of assurance for a new consideration ; and because they were a departure from the summons and plaint, and set up a new and different contract ; and because such new contract, if made, was *nudum pactum* ; and because such an affirmation or adoption, as alleged, was no answer at law to a defence of fraud ; and because such new contract was not shown to be under seal, and the said company were a corporation ; and because the said replications confessed the grounds of defence relied on, and did not avoid them, and showed, if any, an equitable answer only to the defences.

C. R. Barry & Macdonough, in support of the demurrer, contended that the policy was wholly avoided *ab initio* by the frauds, and was incapable of being set up by the acceptance of premiums, after knowledge by the company of the facts ; that the contract being under seal, the breach of the proviso was incapa-

ble of waiver; that the acceptance of the premium could not be relied upon as evidence of a new contract, because the company could only contract under their common seal; and that, even if such contract could be supposed to have existed, the form of the pleadings precluded the plaintiff from relying thereon in the present action. They cited *Ellen v. Topp*,¹ *British Industry Life Assurance Co. v. Ward*,² *Billiter v. Young*,³ *Simpson v. Accidental Death Life Assurance Co.*,⁴ *Farran v. Ottiwell*,⁵ *West v. Blakeway*.⁶

H. Fitzgibbon & Ball, contra, contended that the contract was only voidable at the election of the company, who by their act had affirmed it, and that the breach was capable of being waived. They cited *Ferguson v. Carrington*,⁷ *Selway v. Fogg*,⁸ *Murray v. Mann*; ⁹ Story on Contracts, p. 698; *White v. Garden*,¹⁰ *Stevenson v. Newnham*,¹¹ *Deposit Co. v. Ayscough*,¹² *Sloper v. Cottrell*; ¹³ Chitty on Contracts, 591; *Hyde v. Watts*,¹⁴ *Wing v. Harvey*.¹⁵

Cur. adv. vult.

CHRISTIAN, J. This case came before the court upon a demurrer to the replication.

The action was brought by the plaintiff, Lucy Armstrong, as administratrix of Denis Armstrong, against the defendant, as official manager of the Deposit and General Life Assurance Company, for recovery of the amount of a policy of assurance granted by that company under its seal, upon the life of Denis Armstrong, for £999 19s. 0d. The summons and plaint was in the ordinary form. Its material averments were that the date of the policy was the 17th of December, 1852; that the first premium was then paid; that a second premium was paid on or before the 17th of December, 1853; and that the life assured died upon the 28th of August, 1854.

To the plaint five defences were filed. It will be sufficient to state the import of one of them. The first defence averred that the policy was made on an express condition, which, as set out in

¹ 6 Exch. 424.

⁴ 2 C. B. N. S. 257.

⁷ 9 B. & C. 59.

¹⁰ 10 C. B. 919.

¹² 26 Law Jour. N. S. Q. B. 10.

² 17 C. B. 644.

⁵ 10 Cl. & Fin. 319.

⁸ 5 M. & W. 83.

¹¹ 13 C. B. 302.

¹⁵ 5 De Gex, M. & G. 265.

³ 6 Ell. & Bl. 1.

⁶ 3 Scott N. R. 216.

⁹ 2 Exch. 540.

¹² 6 Ell. & Bl. 761.

¹⁴ 12 Mees. & W. 254.

the defence, was as follows, viz. : [His lordship read this portion of the first defence.]

The defence goes on to aver several facts which, it is alleged, establish, as unquestionably, if true, (which upon the argument they must be taken to be,) they do establish, that Denis Armstrong was, in the language of the condition, guilty of fraud in procuring the policy.

The other four defences are substantially similar, varying only the mode of stating the facts which constitute the fraud.

To each of these defences a special replication was filed. It will be sufficient to state the first ; the others are precisely similar ; this replication avers : [His lordship read it.]

To each of these replications the defendant has demurred.

In the course of the argument it was discovered that the terms of the condition, as they exist in the policy, were not fully set forth in the defence ; and the court was of opinion that the omitted portion bore materially upon the questions raised by the demurrer. But it was considered (after argument) that the policy itself might be looked at, and the case dealt with in the same manner as if the condition had been fully set forth upon the record ; and accordingly the argument proceeded upon that assumption.¹

The following are the terms of the clause, as extracted from the policy itself, viz. : [The material part appears sufficiently in the statement of the case, *supra*.]

Thus it will be seen what the nature of the question is which is raised by the demurrer. The defence alleges that the first of the events, upon the happening of any one of which it was declared that the policy should be void, did in fact occur, viz., the assured "was guilty of fraud in procuring the policy," and that therefore the policy was utterly void. To this the replication answers, (by way of confession and avoidance,) that the company discovered the fraud, and that, after they had so discovered it, they not only did not elect to disaffirm or avoid the policy, but, on the contrary, affirmed the same, and elected to hold it valid ; and that accordingly, during the lifetime of the assured, and after they had become acquainted with the fraud, they received a premium which became due subsequently to such knowledge. The demurrer admits these averments to be true in fact, but insists that in point of law they do not displace the defence.

¹ That part of the case is omitted as immaterial to the present subject.

Now, I confess that I, for one, felt extremely anxious, when considering this case, to discover if I could have grounds sufficient to justify me in holding that a case of the kind put forward in this replication could be made available in a court of law. The question is one of considerable importance, a decision upon which is likely to be of extensive application, and to influence the conduct of insurance companies in many other cases. It is true the averment here is that only one premium accrued, and was received after knowledge of the fraud. But the principle is the same as if there had been ten or twenty. No question can be made as to the authority of the person who received the premium to receive it for the company, and bind the company by all the legal consequences growing out of the fact of such receipt. The averment in the replication is that it was received by the company itself. The truth of that averment is admitted by the demurrer, and, therefore, all things requisite to constitute it such — even if necessary, a power of attorney under the common seal, or a receipt signed by two directors — must be presumed; and then the question which the case presents in the abstract is this: whether, when an assurance company, protected by a clause of this kind, after full knowledge of the happening of some of the events which are to have this invalidating operation, instead of, as they clearly might, thereupon repudiating the contract, think it more for their interest to overlook what has happened, — to treat the policy as still in force, and (of course, upon that assumption) to go on receiving the premiums during all the rest of the life of the assured, — whether they may at least [last?], after the death has taken place, when they are called on for payment, turn round upon the personal representative and tell him, “We will not pay you a farthing; the policy on which, for the last twenty years, (it might be,) with our eyes open to everything, we have been receiving premiums, which your testator regarded as the secure provision for his family or his creditors, is and has always been, by force of its own terms, a mere nullity, and a court of law is bound to treat it as such.”

Now, I confess, it strikes me that such a contention upon the part of an insurance company would be a fraud which would immeasurably transcend the original fraud of the assured, waived and condoned for valuable consideration, as that has been by the company. But it was insisted that a fraud of this kind is one

with which a court of common law is powerless to deal, and for which redress must be sought in the court of equity. I hope, for the credit of the common law, it may be found that that is not so; and, at all events, I am persuaded that it ought to be the wish of those who sit in courts of common law to save themselves, if they can, from the humiliating necessity of handing over to another tribunal the task of doing justice, so simple and obvious.

Several points of view were suggested during the argument, upon the one side and the other, as being those in which the facts of the replication were capable of being presented. [Ultimately, however, the case resolved itself into two propositions, upon which the counsel for the plaintiff finally rested their case, and which were these: First, upon the construction of the policy, they insisted that the words "shall be void," in the condition, do not mean shall be *ipso facto* irrevocably and irrecoverably void, but only void if the company shall, after breach, elect so to treat it. And if this be the true construction, then (they say) that inasmuch as the replication avers that the company, after knowledge of the event, not only did not elect to treat the policy as void, but on the contrary did, for valuable consideration, elect to treat it as of continuing validity, they cannot now revert to an election to treat it as void, and therefore, the replication is a full answer to the plea. But secondly, they insist, that if the question of construction be against them, and that if once the facts averred in the plea are brought to the knowledge of the court, though the court must hold that they annul the policy beyond the reach of confirmation, yet the conduct of the company, as alleged in the replication, has the effect of an estoppel upon them against averring those facts, and that consequently the case must be decided as if they had not been pleaded, or did not exist.

Upon the first of these contentions, I am of opinion that the plaintiff's argument is correct, and, if it can be sustained, it undoubtedly furnishes an easy means of escaping from the fraudulent injustice which the defendant's construction of the clause in question would make it, and similar in other policies, the means of effecting.

The principal argument which was pressed upon us in answer to this view of the plaintiff's case was, that his construction violates what was called the natural and grammatical signification of the word "void," making it bear the same [meaning] of

“voidable.” And we were strongly pressed with the rule of construction which it was said is more closely adhered to in modern times, and for which we were referred to the so often cited *dicta* in *Grey v. Pearson*,¹ especially that of Lord Wensleydale, viz. : “The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument ;” none of which consequences, it was said, would follow from using the word “void” in this policy in what was said to be its grammatical and ordinary sense.

Now with respect to the rule of construction, I find it laid down by Lord Cranworth, also in the same case of *Grey v. Pearson*, in terms which appear to me to be materially different from, and more accurate than, those used by Lord Wensleydale. In p. 78, he says : “The rule of construction which, in modern times particularly, the courts have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless by so doing it appears from the context that you are using them in a different sense from that in which the testator or maker of the deed intended to use them ; or unless by so using them you would be doing something which would manifestly lead to an inconsistency, which could not have been the intention of the party making the instrument.” That is to say, according to Lord Wensleydale, grammar must prevail, unless it will lead to some absurdity, repugnance, or inconsistency. According to Lord Cranworth, grammar must give way, not only when it leads to such consequences, but also when it appears from the context that the grammatical or ordinary sense of the words is not the sense “in which the testator or maker of the deed intended to use them.”

In applying this rule of construction to the present case, it was broadly assumed that the plaintiff’s construction of the policy does violate the natural and ordinary signification of the word “void.” Now I do not think that that is so clear. The real controversy is not, whether the grammatical sense of “void” shall be altered, but whether the intention of the parties does not require that its operation shall be postponed. Does it mean void *eo*

instanti, or void if and when the company shall so elect? If the latter be the true meaning, the effect is merely this, that the word is inoperative until the election is made. When that occurs, it operates for the first time, and then in its natural sense of entire nullification. The truth is, that the question is one of intention and of substance, and not merely of grammar and of words, and is really this,—Which of two modes of operation, of each of which the words of this deed are susceptible, will best effectuate the intention of the maker of it, viz., that which annuls the contract *in invitum*, and beyond the control even of the person for whose benefit the clause was intended, or that which will make it void only in the event of that person thinking it for his benefit so to insist? But be that as it may, I turn now to the more important consideration, whether the question cannot be elucidated by authority more satisfactory than the *dicta* of judges, laying down abstract canons of construction. We are dealing here with language which is of very frequent occurrence in legal instruments, and which has been the subject of discussion and decision in many reported cases. If it be of that rigid and inflexible character that in this case it bars the path in which a court of law must tread on its way of justice, we may at least expect to be referred to the cases in which courts of law have already found themselves compelled to succumb to such an obstacle. A great number of cases were, in fact, referred to upon both sides.

Now, I believe I am correct in this, (and it is very remarkable,) that amongst those cited for the defendant, (at least during the argument which took place after I had the honor of a seat in this court, the case having been argued before,) not one was referred to (nor am I aware that any exists which is law at this day) in which the word “void” occurring in any private instrument, such as a deed or will, was held to bear that extreme sense which excludes the possibility of confirmation after the act of avoidance. I have used the qualification “which is law at this day,” for the purpose of excluding the older cases of the series which have arisen upon leases, the later of which were relied on by the plaintiff, and to which I shall presently advert. The case which was mainly (indeed upon this branch of the argument almost exclusively) relied on for the defendants was *Billiter v. Young*; ¹ but a very slight consideration of that case will be suf-

1 6 EL. & BL. 1.

ficient to demonstrate its total dissimilarity to the present. It turned upon the construction of the 59th section of the English statute for abolishing arrest on mesne process, &c., 1 & 2 Vict. c. 110; which in substance enacted, that if an insolvent debtor should, within three months before the commencement of his imprisonment, voluntarily charge his estate, every such charge "shall be deemed, and is hereby declared to be fraudulent and void as against the provisional or other assignee under the act." An insolvent, of whom the plaintiff in *Billiter v. Young* was assignee, executed before his insolvency a warrant of attorney to confess judgment at suit of Young, the defendant in that case, under circumstances which brought it within the terms of this enactment. Under this warrant, Young entered judgment, issued execution, and seized and sold the goods, all prior to the insolvency. After the insolvency, Billiter, as assignee, brought an action of trover against Young, relying upon the seizure and sale before the insolvency as a wrongful conversion. Whether it was so or not depended upon the operation which should be attributed to the foregoing section of the act; *i. e.*, whether it should be held to render the transaction void absolutely according to the literal import of the language, — in which case the plaintiff would be entitled to succeed; or whether it should be held to render it void only at the election of the assignee, — in which case a seizure before the insolvency would not be a wrongful conversion, and whatever other remedy the assignee might have, he could not maintain trover upon that seizure as a conversion. It was held in the exchequer chamber, by five judges, that the former was the true construction. On the other hand, three judges, including the present Lord Wensleydale, were of the contrary opinion, and held, in the words of Lord Wensleydale, (p. 9,) that "the transaction, though fraudulent in the bankrupt against the assignees, is only void at their election; and before it was actually avoided, some act must be done to indicate the intention so to do." Now, it will be observed, that this was the case of an act of parliament which, for the protection of the general body of creditors, enacted, in language the most peremptory, that certain acts of the insolvent, prejudicial to them, "should be deemed, and were thereby declared, fraudulent and void;" and the question was, whether, notwithstanding this language, it should be in the election of the assignee either to claim for the creditors, or to

waive the benefit of the enactment? The observations of Alderson, B., in p. 57 of the report, present what appears to be the strong ground in support of the decision. "It will be found that in most, if not in all, of the cases, where that which is declared to be void is held to be voidable at the option of the party aggrieved, the fact is that it is in his option, where it may be reasonably probable that it will be for his advantage, to omit to declare it void, and to retain it as valid. Thus, in the case of a lease, the lessee may exercise the option of avoiding it or not; for there it may often be for his advantage not to avoid it, and he, acting for himself, may reasonably judge of that. But I think it would be a strange construction, in the case of a mere trustee, whose duty it is to act in one way only, to construe the words as giving him what would be in the nature of an option illusory altogether."

But the case with which we have to deal is that of an instrument of private contract, containing, for the contractor's protection solely, a clause which provides that in certain events the contract shall be void; and the question is, whether, when the event happens, not only is the avoidance complete, before any indication of intention by the contractor to avail himself of the clause, but whether deliberate and repeated acts of affirmance done by him, for valuable consideration and with full notice, may be afterwards treated by himself as absolutely nugatory? Having regard to these peculiarities of the two cases, it is not, I think, too much to say that while the decision of the majority of the judges, in *Billiter v. Young*, affords little, if any authority in support of the defendant's contention in the present case, the opinions of the minority afford a strong *a fortiori* authority in favor of the plaintiff.

But the plaintiff appeals to a body of authority which touches this question more nearly. The class of cases referred to and explained by Baron Alderson, in the passage of his judgment I have just read, bear very directly upon it. I allude to the long train of decisions which have been made upon leases, and by which, notwithstanding some early cases, it is now clearly established that, in the case of a lease for years, a proviso declaring that upon breach of covenant the lease shall be null and void, shall be construed to mean, no matter how strong and emphatic the language, void at the election only of the lessor; so that, although a covenant may be broken, the lease remains valid until

the lessor intimates his intention to take advantage of the proviso ; and if, before he does so, he by any act, such as receipt of rent subsequently accruing, recognizes the continuance of the lease, he cannot afterwards rely upon such antecedent breach. Of these cases, *Goodright v. Davids*,¹ *Rede v. Farr*,² *Doe v. Bancks*,³ *Arnsby v. Woodward*,⁴ and *Roberts v. Davey*,⁵ are especially worthy of observation ; and see, also, per Sir T. Plumer, V. C., *Dakin v. Cope*.⁶

If the instrument in question in this case, instead of being a policy of insurance, had been a lease by the company to Denis Armstrong, containing a similar proviso, these cases would, in my opinion, conclusively establish that if the company, after knowledge of the event, (even a fraud in obtaining the lease,) thought proper to accept rent subsequently accruing due, they could not afterwards recur to that event as having invalidated the lease. But the principle of those decisions cannot be confined to leases ; and that it is not so is shown by the case of *Hyde v. Watts*.⁷ That was an action for the price of goods sold and delivered. The defendant pleaded a release upon a composition deed. The replication set out on oyer the composition deed, and showed that it contained a condition by which the plaintiff was bound to effect and keep up an insurance for £1,500, with a proviso that, in default of his doing so, the deed “ should be utterly null and void to all intents and purposes whatsoever ; ” and it averred as a breach of the condition that the defendant did not effect the policy. To this there was a rejoinder admitting the breach, but averring acceptance of £500 in satisfaction of it ; and, upon demurrer to the rejoinder, it was held valid, upon the ground that the word “ void ” in the deed meant “ void ” as against the creditors if they should so elect.

But in answer to those authorities, it was strongly insisted, upon the part of the defendant, that they all proceeded upon a ground which is altogether wanting in the present case. In all of them the lease or deed contained several stipulations upon the part of the person whose act was relied on as having rendered void the instrument. To allow to it that operation irrevocably of

¹ 2 Cowp. 803.

² 6 M. & S. 121.

³ 4 B. & Ald. 401.

⁴ 6 B. & Cr. 519.

⁵ 4 B. & Ad. 664.

⁶ 2 Russ. 174.

⁷ 12 M. & W. 254.

the will of the other party, would be attended with the absurd consequence of enabling the wrong-doer, by his own breach of one part of his contract, to relieve himself thenceforth from the obligation of the remainder. But this reasoning was, it was said, wholly inapplicable to a policy of insurance, which is a deed-poll by the company only, and contains no stipulation binding on the assured. Now assuming, for the sake of argument, that this distinction does exist in point of fact, in other words, that no case can be put in which the strict construction of the word "void" would confer upon the assured an advantage growing out of his own fraud, it still remains necessary, for the completeness of the defendant's argument, to show that it is upon this peculiarity that necessarily and exclusively all the decisions to which I have adverted are based. But an examination of them will show that such is not the fact, and that what the defendant's argument seeks to do in this particular is to confine what the number and uniformity of the decisions warrant me in calling a settled rule of construction, within the limits of one particular reason, and which only in some of them has been assigned for it. Without going through them in detail, those cases may for this purpose be classed under two heads: first, those in which the landlord was insisting upon the continued validity of the lease, whilst the tenant or other party in the same interest contended that it had become void by reason of some previous breach of covenant committed by himself. Of these, *Doe v. Banks* and *Rede v. Farr* may be taken as examples; and of course the obvious reasoning in such cases was the absurdity of the construction which would enable the tenant to rely on a previous wrong to relieve himself from the further obligation of his contract. But the other class comprise those which more closely resemble the present, namely, those in which it was the landlord who was insisting upon the invalidation of the lease, by a default of the tenant, and notwithstanding subsequent receipt of rent by himself. These, of which *Goodright v. Davids*, *Arnsby v. Woodward*, *Roberts v. Davey*, are examples, are the cases which distinctly raised the very question which we have here to consider, namely, whether clauses of this kind are coercive even upon the party for whose protection they were introduced, or whether he may claim or waive the benefit of them, as he thinks most for his advantage, but with the obligation of abiding by his election when once it has been made? Now it is obvious

that the very same train of reasoning which prevailed in the former class of cases might equally have been relied upon by way of argument in the latter, as one of the consequences which the landlord's construction necessarily involved ; and if that consequence formed, as is now insisted, the essential foundation of all these cases, we would naturally expect to find it relied on accordingly. But the fact is that, in this latter class of cases, that mode of reasoning is not adverted to by the court at all, but the judgments proceed upon other grounds, which are distinctly applicable to the present case.

Thus, in *Goodright v. Davids*, Lord Mansfield's reasons are : " To construe this acceptance of rent, due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shows he meant the lease should continue." So in the case of *Arnsby v. Woodward*, this very same ground, the absurdity of allowing the tenant to take advantage of his own wrong, was pressed in argument as being that on which the previous cases had proceeded, and as therefore rendering them inapplicable, where it was the landlord who was insisting on the invalidation of the lease. Lord Tenterden, in his judgment, does not urge (as he might and would, if it were the only true ground of decision) that the topic was just as available in the way of argument in the case before him ; but passing that by altogether, he reasons precisely as the plaintiff reasons here : " Receipt of rent by the landlord was an admission that the lease was subsisting at the time when that rent became due, and he could not afterwards insist upon a forfeiture previously committed. To hold the contrary might be productive of great injustice, for the effect would be this : it would enable a landlord at any period to eject a tenant, after he had given him reason to suppose the forfeiture was waived, and after the latter had, upon that supposition, expended his money in improving." So in *Roberts v. Davey*, the only reasons assigned by the court are, that the intention was that the instrument was liable to be rendered void only at the election of the grantor, and that if he meant to avail himself of the clause, he should have given notice of his intention to do so. In *Billiter v. Young*, so strongly relied on by the defend-

ant, Alderson, B., thus explains the principle of all those cases : " It will be found that in most, if not all, of the cases where that which is declared to be void is held to be voidable at the option of the party aggrieved, the fact is that it is in his option when it may be reasonably probable that it will be for his advantage to omit to declare it void, and to retain it as valid." Now that is precisely the option which the company have exercised in this case. After knowledge of the fraud, they thought it " for their advantage " to omit to declare the policy void, and to retain it as valid ; and having done so, and pocketed the premium, they now, when called on to pay the amount of the policy, seek to fall back upon the other side of the option. It therefore appears to my mind perfectly manifest, that the means by which the defendant endeavors to exclude the application of the cases I have been considering, are simply by narrowing, most unwarrantably, the grounds upon which they proceed ; and that, with regard to those of them which present an order of circumstances most nearly analogous to the present case, not only is the reason, which is said to be the sole reason for the decision, never glanced at at all, but others are assigned, which *mutatis mutandis* are closely and pointedly applicable to the case before us.

But is it so clear that this particular reason also does not apply to this case ? Can no instance be assigned in which it might be the interest of the assured to insist, against the will of the insurers, upon the incurable nullity of the contract ? If such be the inevitable operation of its language, so that, after any amount of premium received, with knowledge of everything, the company may at the last refuse to pay the policy, on the ground that it is nought, it must be the reciprocal right of the assured to recover back the premiums paid under a mistake and for no consideration. It is true, by the terms of the proviso, in the given events, premiums paid are to be forfeited to the company ; but must not that, in reason and in justice, be restricted to premiums paid before knowledge by the company of the invalidating event ? That construction satisfies the words of the clause ; but it would be a monstrous climax of absurdity and fraud to hold that the company might go on knowingly and deceitfully receiving the premiums, and in the end insist upon retaining them as well as the insurance money. Suppose then that, after a number of years, during which premiums were paid and received, the assured

becomes aware of the predicament in which he stands, and that it is in the power of the company when they please to repudiate the policy, and thereupon takes his stand and says, "I will pay no more, and I demand back all I have paid since you had knowledge that the policy was annulled." Suppose the company, on the other hand, prefers to go on, and are willing to confirm the policy, but the assured refuses, and brings his action for the premiums. Here is the same question of construction which now exists in this case, presented under conditions analogous to those in *Doe v. Bancks*, and the others of that class; and therefore all the reasoning which existed in any of the foregoing cases may be brought to bear upon this, and all unreasonableness or injustice upon the one side or the other may be avoided, by applying in this case the same principle of construction which was established in those. viz., holding that "void" in this policy means "void if the company shall so elect to treat it;" and whilst, upon the other hand, (if upon the knowledge of the event they do so elect,) they may annul the contract, and, notwithstanding, retain all premiums previously paid; so if, on the other hand, they elect otherwise, and evince that election by receipt of premium subsequently accruing due, they affirm the continuance of the validity of the policy.

Another class of cases which was referred to by the counsel for the plaintiff, as instancing the freedom which courts have assumed in moulding language of this kind, so as to avoid unjust and unreasonable consequences, are those which have arisen upon the English statutes of Elizabeth, relating to ecclesiastical leases, which will be found referred to by Tindal, C. J., in *Malins v. Freeman*.¹

These statutes had enacted that all leases by bishops, &c., in any other manner than as required in the acts, "shall be utterly void and of no effect, to all intents and purposes." Yet it was held, notwithstanding this positive language, that the leases were not void at all as against the grantors, but only against the successors.

It now only remains for me to notice one case more, which is, however, of great importance in the argument, and in its facts more nearly resembles the present than any other that has been cited. I allude to the case of *Wing v. Harvey*.² It was decided by the Lords Justices Knight Bruce and Turner. It came before

¹ 4 Bing. N. C. 398.

² 5 De G., M. & G. 265.

them in the shape of what in the court of chancery in England is termed a claim, by the plaintiff, as assignee of a policy executed by one Bennett, on his own life, with the Norwich Union Society. On the policy was indorsed a condition that, "if the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the license of the directors, this policy shall become void, the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use." The material facts were, that Bennett, after assigning the policy, went to reside abroad, without license of the directors. The plaintiff continued to pay the premiums, for a number of years, at a country office of the company, to their agent there, who was informed of Bennett's absence, and stated to the plaintiff that the policy was notwithstanding good, provided the premiums were regularly paid. There was also some evidence that the head officer, to whom the premiums were transmitted, had notice of Bennett's absence; but the case was decided irrespectively of this. After Bennett's death, the company refused payment, on the ground that, by the terms of the proviso, the policy became void when Bennett left Europe without leave of the directors; but they offered to repay the premiums.

The claim was filed for payment of the insurance money, or, in the alternative, repayment of the premiums, with interest. The court, without calling for a reply, decided that the effect of the receipt of the premiums with knowledge was, that the policy continued to be valid and subsisting, and they decreed payment of the full amount.

The similarity of this case to the one before us is too obvious to need comment; and I shall now proceed to consider the grounds upon which its value as an authority has been impugned. In the first place, it is said that it was the decision of a court of equity, that it proceeded upon equitable grounds, and is consequently no authority for the guidance of a court of law. Unless the second branch of this proposition be true, the first is manifestly of no importance. If the decision did not proceed upon equitable grounds, but upon such as are common to courts of law and equity, it is as valid an authority here as would be a judgment of the queen's bench. Was it then decided upon grounds peculiar to courts of equity? If so, they will be apparent upon the report. There is a decision of two judges of the very highest

character in eminence, as perfect masters as any now living of our judicature, more especially as regards the divergences of equity from law; as little likely, therefore, they are as any to sustain a judgment of equity by reasons of law; yet it will be difficult to point out a single reason or observation in the judgment of either, which would not have been equally pertinent in an action on the policy in the name of Bennett's personal representative. A little attention to the report will make it very clear that the ground of decision was simply this, that the effect of the receipt of the premiums was, that the original validity of the policy remained, which could only be by holding "void" to mean "void only at the election of the company." The argument of the counsel for the company distinctly raised the question. It was this: "The policies became void by the breach of the condition indorsed upon them, and could only have been again entered into by the association itself, or some person having authority from them. Lockwood (the agent) had no authority to grant a policy in contravention of the rules of the society."

Again, "it could not be presumed that he had authority to vary the contract." That is to say, the original contract is utterly gone; the plaintiff can only succeed as upon a new contract, but the agent had no authority to bind the company by such. How do the judges answer this argument (for they dispensed with any answer from the plaintiff's counsel)? Is it by holding that a new contract was created in equity, if not at law; or that, upon any other special ground of equity, admitting that the original contract was gone, relief should be given? Nothing of the kind. Lord Justice K. Bruce's answer to the counsel is: "Did not the plaintiff pay the premiums upon the condition that the policies were to be considered as valid and subsisting?" and in his judgment, he puts it expressly as "a waiver of the forfeiture," and gives validity to the act of the agent, upon the ground that, though he had no authority to make new contracts, "he was their agent for the purpose of receiving premiums on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual, notwithstanding Bennett's residence in Canada." Lord Justice Turner uses language precisely similar, and concludes his judgment thus: "My opinion is, that these policies must be considered to have been continuing policies." Nor do I, for my part, understand

how these eminent judges could possibly have reasoned otherwise. How could there be a question of equity distinct from the question of law? The rules of construction are the same in equity as in law. If a court of law construing that policy would hold that "void" meant *eo instanti* incurably null, a court of equity, upon the question of construction, must manifestly hold the same; and, so holding, I am not aware of any head of equity jurisdiction under which the court would have jurisdiction to reimpose upon the party the very contract from which, by construction of its own language, he had become relieved. Whatever ground there might be for relieving from the forfeiture of the premiums paid, as to which I say nothing, I know of none which would justify the reimposition of the contract for payment of the insurance money. It is perfectly apparent that the decision only could, as in fact it did, proceed upon the continuance of the original contract, a result which could by no possibility be arrived at, save by adopting that mode of construing the policy then in question, which is contended for by the plaintiff here; and if the plaintiff in that case, instead of suing in his own name, (which as assignee of a *chose in action* he could of course only do in equity,) had brought an action in a court of law, in the name of Bennett's personal representative, the result of that action must have been the same as the suit of *Wing v. Harvey*, at least if that case be well decided at all.

One of the events specified in the clause in the present case is similar to that which was provided for in the policy in *Wing v. Harvey*; and if here, as there, it had been the only one, and the breach had been of that, the two cases would have been on all-fours with each other. But a distinction exists between them, which has been strongly relied upon, not only as removing the authority of *Wing v. Harvey*, but as constituting in itself a strong substantive ground in support of the defendants' view. In the principal case, several distinct events are prescribed by the policy, as those upon the happening of any of which it shall be void. All save the first consist, like that in *Wing v. Harvey*, of matter subsequent to the contract. But the first is matter contemporaneous with it, and infecting it from its origin, viz., "fraud in procuring it;" and it is insisted that, however the case might be as to a breach of any of the other conditions, it is impossible to

give to the word "void," as applied to this one, any but its strictest and most severe interpretation.

Now looking at the case from this point of view, it at once occurs to ask whether it is possible to give to the same word different meanings, as applied to different branches of the same sentence? Suppose a case come before us to-morrow, of an action upon a policy precisely similar to the present, resisted upon the ground of unlicensed residence abroad, or military or naval service, to which the plaintiff replies the receipt of premiums after knowledge of the event; are we prepared to say that we would hold that policy void? . Against doing so, *Wing v. Harvey* would be an authority in point; the former cases would be authorities in principle; and justice and common sense would speak with more authority than either. If, then, in a case of a breach of one of the conditions subsequent, we would be bound by authority to adopt the plaintiff's construction, can we now do otherwise than give to the word the same meaning, as regards the other events of the series, to all of which it is, in one and the same sentence, indiscriminately applied? To do otherwise would, in my humble judgment, be to violate one of the most elementary principles of construction; and that, not from necessity or for justice, but capriciously, and in furtherance of the grossest injustice and fraud. The case might be different if there were anything in the intrinsic nature of the thing forbidden by this breach of the clause, which called for a different mode of interpretation. But the reverse is the fact. It is the nature of fraud, that it vitiates a contract in the absence even of any special stipulation. But it is now well settled that the meaning of that is, that the contract is not absolutely void, but only void at the election of the party defrauded.¹ Is not the more rational interpretation then that, as to this particular event, the clause is merely declaratory of the law? If, indeed, no event but fraud were specified, it might plausibly be asked, why insert such a clause at all, unless something more were meant than the law itself would imply? But this argument loses all importance when we find the insertion of the clause naturally accounted for by the expression of other causes of avoidance, (all which mean, upon authority, avoidance

¹ Per Campbell, C. J. in *The Deposit and General Life Assurance Co. v. Ayscough*, 6 Ell. & Bl. 763.

at election,) as well as by the provision for forfeiture of premiums, which the law would probably not imply, even in the case of fraud. Taking the whole clause as it stands, the rational and sensible interpretation of it is, in my mind, this, that when the insurers stipulate that if there has been fraud by the assured, or if there shall be default by him in certain other particulars, the policy "shall be void," the true meaning is that it shall be so in the sense in which the law itself says that all contracts shall be void for antecedent fraud, and in which the law has so repeatedly construed contracts, guarding against subsequent misconduct, that is to say, void if the aggrieved party shall so elect; and it is further observable that in no way can these words of futurity, "shall be void," have any effect as applied to the original fraud, save by holding that they refer to an election to be made by the company after knowledge of fraud.

The counsel for the defendant, pressed by the absurdities of holding that the same word could bear different meanings, as applied to different branches of the same sentence, sought to turn that argument in their favor, by asserting that, as to one of the conditions, at all events, the effect of a breach must be that the policy becomes *ipso facto* void. If the assured dies upon the high seas, it is said that here is an instance in which the policy becomes wholly void, and there can be no confirmation. The answer to this is, that it is an obvious fallacy, and begs the question. If the plaintiff's argument be correct, the policy does not become void by a death on the seas until the company shall intimate their intention so to treat it; and if before they do so, they enter into any dealing which involves an affirmance that it is subsisting, they cannot afterwards retract.

The sole difference between this and the other events is that as the life has dropped, there can be no affirmance by receipt of premiums. But there [this?] can be so by other means; and indeed, even possibly by receipt of a premium, — as, for example, in case of a policy with days of grace for payment of the premium; the life may die on the seas, after a premium accrued due, but within the days of grace, and the company, after their knowledge of the fact, receive the premium.

If the question in this case were untouched by authority, I believe I should, as mere matter of construction, come to the same conclusion as that at which I have arrived; but, fortified by the

authority of *Wing v. Harvey*, fortified as I consider that case to be by the previous cases, (even though, strangely enough, they were not cited in it,) I have the less hesitation in holding that the true office and function of clauses of this kind in contracts is merely to serve as a shield for the protection of the party who inserts them, if he shall think proper so to use them; and gross as, upon the averments of this record, must be taken to have been the fraud of the plaintiff in obtaining this policy, I cannot but think that we should be giving effect to a fraud by this company, far more monstrous, if after they have, with full knowledge of the fraud that had been practised upon them, deliberately and for pecuniary considerations overlooked it, and affirmed the subsistence of the policy, we should suffer them now, after the consequences to the assured have become irreparable, to tell his representatives, his family, and his creditors, that during all the time, while they were putting money in their pockets, on the faith of the full validity of the policy, it was in reality utterly null and void.

For these reasons, I am of opinion that the replication furnishes a sufficient answer to the defence, and that consequently the demurrer ought to be overruled.

Founding my judgment upon the foregoing grounds, it is unnecessary that I should express an opinion upon the second proposition which, as I stated at the outset, was argued for the plaintiff. It proceeds upon an application to this case of the doctrine of the well-known cases of *Pickard v. Sears*,¹ and *Freeman v. Cooke*.² Of this branch of the argument I shall say no more than that, if it were necessary for the determination of the case to come to a conclusion upon it, I am not at all prepared to say that I should hold it to be untenable. In addition to the cases which were cited upon it, there are two others which, if the subject were to be pursued, would be found worthy of consideration. They are *Simpson v. Accidental Insurance Company*,³ and *Tyerman v. Smith*.⁴ The first goes to show (though not actually deciding it) that, in the opinion of the bench and bar in England, estoppel by conduct is not, as was insisted here, confined to cases of contract by parol, but applies equally to contracts by deed,

¹ 6 Ad. & El. 475.

³ 2 Com. B. N. S. 257.

² 2 Exch. 654.

⁴ 6 El. & B. 719.

and showing that it is not necessary that the representation (by words or by contract) which creates the estoppel should be a representation respecting facts known only to the party representing, but that the same consequence follows from a representation regarding facts, the true state of which is equally known to both.

KEOGH, J. My brother Christian has so fully and so clearly stated all the facts of this case, as to render it unnecessary for me to repeat them. He has also brought forward, in the most lucid manner, the bearings and results of the respective arguments on both sides, and has narrowed the question which the court has to decide, by reducing it to two propositions, — one relating to construction, and the other to estoppel. As I have the good fortune to agree with him in opinion, I need not refer to more than one or two of the authorities. I concur with him that this case depends upon the construction of the policy; but in arriving at a decision as to what that should be, the doubt which arises in my mind was not so much in reference to the wording of the policy, but as to what should be the rule of construction. My brother Christian has referred to the case of *Grey v. Pearson*,¹ where the rule of construction is propounded by Lord Wensleydale, in the manner in which it has been already quoted. I confess that I am much impressed with the importance of maintaining a rule of construction whereby the parties would be bound by the grammatical sense of the language which they employed, more especially when I turn to a document like this, and seek to illustrate that rule by reference to this policy, which contains an express condition that if the party insured, amongst other events, should be guilty of fraud, the instrument shall become void. I have considerable difficulty in my own mind in departing from that rule of construction. But on the other hand, I think that the present case is capable of being brought within the exception which has been engrafted on that rule, namely, that the grammatical construction can be modified and departed from, where a manifest inconsistency would otherwise arise, or where it is evident that the instrument intended a sense somewhat different from the strict grammatical construction. Turning to the document itself, I find that the proviso runs in these terms: [His

¹ 6 H. L. Cas. 61.

lordship read it.] Now, unquestionably, the distinction in this case exists, that the condition, so far as it relates to fraud, relates to a thing *coexistent* with the execution of the instrument itself, not to a thing to be subsequently done ; but in the other branches of the proviso, the word “ void ” applies to conditions which necessarily savor of futurity, and which might occur subsequently. In the one case we find a certain thing, in case it should then exist, declared to have the effect of avoiding the policy, which thing is not to be compared in any way with the other future grounds of avoidance, which are of an essentially different character, but which equally with the former will render the contract void. It is plain, therefore, that without straining in some way the rule of construction, we cannot arrive at a uniform decision regarding the several members of this proviso. A vast mass of cases have been referred to, and if those were authorities which distinctly govern this subject, the court would be bound to follow them, no matter how great might be the evil resulting from such a decision ; but, as my brother Christian has stated, there is no precise authority bearing upon the present question, or in which it has been held that, where a policy of this kind has been executed, and the company, after discovering the fraud, has elected to receive the premium, and so to treat the policy as existing, the latter has been held void, and not voidable ; while, on the other hand, a rather numerous class of cases has been referred to, such as those between landlord and tenant, composition deeds, &c., all of which show that courts of justice, in the interpretation of instruments couched in language as strong as this, have been in the habit of moulding the word “ void ” into the signification of “ voidable at the election of one of the parties.” With respect to the word “ void ” having the meaning of “ voidable,” in one term of this condition, the authority of *Wing v. Harvey* is very precise ; the words in that policy being, “ if the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the license of the directors, the policy shall become void, the insurance hereby intended to be effected shall cease, and the money intended to be paid to the society become forfeited to its use.” Now, where is the distinction between the words of the policy and the corresponding portion of the condition in this case ?

In order to give a uniform construction to the entire proviso, it is safer to hold that the word “ void ” bears throughout the same

Armstrong v. Turquand.

construction ; and I confess that, fortified by the authority of two such judges as Lords Justices Turner and Knight Bruce, I am disposed to construe the latter portion of the sentence as meaning "voidable," and to give the word "void" a similar effect through the entire condition. It has been said that there is one term in which the word in question must be construed to mean "absolutely void," namely, that relating to the death of the party on the high seas ; but that does not at all follow, for there are many ways in which the company might treat the policy as subsisting. If, for instance, the party died whilst the days of grace were running, after knowledge of the fact of his having died on the seas, they might elect to take the money, and so would be bound. I am disposed to give the effect I have stated to *Wing v. Harvey*. That case does not appear to have been decided on any special equitable grounds, the words of Lord Justice Turner being, that "the policy must be considered as a continuing policy." I am disposed to adopt that decision, and to carry that meaning throughout the whole of the present condition. In so doing, I am somewhat influenced by the disastrous consequences that would otherwise result. Policies of life insurance, as a security, are not of an early date. Down to the year 1800, not more than one insurance office was in existence ; but we know that since that period policies of insurance have been mixed up with all the transactions of this country. Through the medium of such, provisions have been made for marriage, infancy, widowhood, and creditors. They are in the form of deeds-poll, not signed by both parties, and, though not assignable at law, are frequently passed from hand to hand as a security for money, and the party who takes such an assignment cannot see whether the conditions have been performed until the policy has passed into his hands ; and I am not reluctant to confess that I should shrink from coming to a conclusion which would so seriously affect the value of such securities. It is urged that it is proper to avoid such fraudulent transactions, because the party who has committed a fraud should suffer for it ; but the fact is that in ninety-nine out of one hundred of these cases it is not the party who commits the fraud that is the sufferer by it ; and it is admitted, upon this demurrer, for the purpose of argument, that the company, with knowledge of the fraud, elected to treat the policy as continuing ; and so, if there were a fraud committed in the inception of the policy, there would

have been, in the absence of waiver, a like fraud on the part of the company in thus continuing to receive the premiums. Many frauds might be perpetrated on the community at large, if such practices were to be encouraged.

Having regard to this, I have arrived at this conclusion, though with considerable hesitation. I cannot shut my eyes to the fact that the rule of construction may be read in a totally different manner. I fully appreciate the evil consequences of perpetually travelling away from the literal meaning of words, and setting up a different meaning from what they have in ordinary parlance; whilst, on the other hand, there is abundant judicial authority enabling me to give that construction which will avoid the infliction of serious consequences upon all classes.

I have also the misfortune of having to differ from another member of the court, for whose opinion I have the highest respect, and the decision at which I have arrived cannot be wholly satisfactory to my own mind, when I know that it is at variance with that of my lord chief justice.

BALL, J. My brother Keogh has said that, after hearing the judgment of my brother Christian, he felt it difficult to add anything to the views expressed by him. If that were so, how much greater difficulty must I experience in adding anything to the judgments of both my brethren who have preceded me, and in whose views I entirely concur. My brother Christian has indeed swept the whole case both in law and fact, and has not left a single point untouched; and I am unwilling to incur the risk of impairing the efficiency of his observations by any attempt to fortify them. My view of the law of this case has undergone considerable fluctuation in its progress, and since it was last before the court in argument. When the case of *Wing v. Harvey* was cited at the bar, I certainly was under the impression that it had been decided on equitable grounds, and that it was not an authority to be followed in a court of law. I had understood that the bar on both sides acquiesced in the notion that it had been decided on such grounds, and I was not disposed to alter or modify the view I then entertained of the law of this case, by reason of that decision. However, I have considered the case of *Wing v. Harvey* since the argument, and have come to the conclusion that it is an authority, in point of law, on the case now before us, and that the principle upon which it rests rules the present case. I do not

propose, as I have already intimated, to go at large into the discussion which has been pressed by my brethren who have preceded me. I have watched with care for any omission which might have occurred in the course of their judgment, and which it might have been in my power to supply ; but I cannot say that, with the exception of one or two matters, and which I am not sure that my brother Keogh did not notice, I can add a single observation. We were much pressed, in the argument at the bar, by the consideration that the plaintiff here admits the fraud practised by her testator in the obtaining of the policy, and that a decision in her favor would hold out a direct encouragement to the commission of frauds of the same character. This appears to be true in a certain sense ; that is, if the insurance company, instead of treating the policy (which they could have done) as at an end, in consequence of the fraud practised in obtaining it, consider it for their advantage to treat it as a continuing contract, and accordingly persist in receiving the premiums after being made aware of the fraud ; but, on the other hand, if the decision were to be in favor of the company, see the extent of encouragement which would be thereby afforded to the perpetration of another class of frauds by insurance companies. Take the case of an insurance company, with knowledge of the fraud committed in obtaining the policy, continuing year after year to receive the premiums, and thereby causing all parties, as well those to whom the policy belongs, as those who might be disposed to take an assignment of it for valuable consideration, to feel assured that they are dealing with a security binding the company to pay the amount insured upon the fall of the life ; take the case put by my brother Keogh, of a policy of insurance, under the circumstances I have described, being made the subject of a family settlement, as a provision for a wife and child, (a transaction of no unusual occurrence,) and consider what serious fraud you would enable insurance companies to effect in all these cases, by holding them entitled, after receiving the premiums,—it may be for many years, with a knowledge of the fraud,—to refuse to pay the amount insured. But even where no assignment or settlement of the policy has taken place, and it has continued, as in this instance, to be the property of the party by whom it had been effected, during the period of his life, see what an open [door] to fraud is afforded to a company, if they are to be at liberty to

cause the party to be under the impression, to the day of his death, that the policy is a valid security; and then when he is dead, who, if living, could possibly have explained satisfactorily the circumstances of alleged fraud in the effecting of the policy, to insist for the first time that they are not bound to pay it; and this, where perchance the evidence which, if forthcoming, would have rebutted the charge of fraud in the obtaining of the policy, has by the effect of time or otherwise ceased to be in existence.

I am therefore of opinion that the defendant's demurrer should be overruled.

MONAHAN, C. J. In this case I have the misfortune of not being able to concur in the opinion of the other members of the court. I say, with great sincerity, I have great diffidence in the correctness of the opinion I have formed, differing as it does with the carefully considered opinions of the other members of the court; but, having formed a strong opinion on the subject, I consider the case one of too much importance to be an assenting party to a judgment, the principle of which I do not approve of. The action is brought by a creditor, in the name of the widow and personal representatives of the late Mr. Armstrong, to recover the amount of a policy of insurance effected by that gentleman on his own life. The defences pleaded by the company are, that Armstrong had, upon a previous occasion, with the view to effecting an insurance with another company, obtained a certificate from the medical referee, and that subsequently, although he had been attacked with paralysis, and had met with a severe accident, and was virtually in a dying state, a friend of his waited on the agent of the present company, and induced him to believe that that document truly represented his then state of health, so as to render it unnecessary for him to go before the medical officer of the company, and that the company acted upon that statement, accepted Armstrong's proposal, and effected the policy, which contained the following condition: [His lordship read it.] To this defence of the company the plaintiff has filed a replication, the substance of which is, that after the effecting of the policy, and before the next premium became due, the company had notice of the entire fraud; nevertheless they did not thereupon disaffirm the contract, but, on the contrary, received the second premium, and therefore that the plaintiff is now entitled to sue

on and recover the amount of the policy. I confess I was somewhat struck with the absence of authorities bearing upon this question ; and such appeared to me, as it were, to indicate the existence of something like an opinion on the part of the profession, that such a replication would not afford a legal answer to such a defence ; and it does seem strange that, notwithstanding the innumerable cases in which insurance companies have resisted actions on life policies, on grounds similar to the present case, in the year 1858 it has occurred to ingenious counsels for the first time to reply a subsequent confirmation, as in the present case. But of course I do not mean to found my judgment on such grounds. The legal distinction between "void" and "voidable" is well known, and, in my opinion, in construing the contracts of parties, we are bound to give words their ordinary legal meaning, unless doing so would be attended with unreasonable or absurd consequences, or the context shows that the words were used in a sense different from their ordinary legal meaning ; and I am not disposed to attach much importance to the question whether the proviso would not have been more strictly according to the rules of grammar, if the construction adopted by me be the true one, in case the expression had been, "shall be deemed to have been void," rather than "shall be void." No doubt, from the earliest times to the present, in cases between landlord and tenant, "void" has been held to mean "voidable" at the election of the landlord — upon this principle, that no man should be allowed to rely upon his own wrong, and that otherwise the tenant would have it in his power, by his wrongful act, to get rid of his contract. So in the case of policies of insurance, if the party insured was bound to pay the annual premiums during the whole of his life, and it was not optional with him whether he would do so or not, the same principle would be applicable ; but, as it is, there is no obligation upon the insured to continue the policy beyond the current year ; therefore the cases between landlord and tenant have no application. Then as to another class of cases, in which the legislature have declared certain leases made by ecclesiastical persons to be void, it must be remembered that these laws were made, not for the benefit of the party making the lease, but for that of his successor ; and accordingly, in such cases, the clause is held to have no application in favor of the party making the void lease ; but as against his successor, "void" is held to

mean what it expresses, and not merely voidable, and accordingly no act of the successor will set up or confirm that which the law declared void. In the present case, if the clause rendering the policy void had been confined to the case of its having been obtained by fraud, I am not aware of any legal principle which would justify the court in departing from the ordinary meaning of the word "void." Nothing is more odious in the eye of the law than fraud; and I cannot understand why a court of justice should strain the meaning of words, in order to enable parties who admit that they have been guilty of fraud to obtain the dishonest fruits of their fraudulent conduct. What must be the result of the present decision? Simply this: instead of a plain intelligible question for a jury to decide, namely, whether the party effecting the insurance has been guilty of fraud in obtaining the policy, the question for the future will be, whether, after the commission of the fraud and the effecting of the policy, notice of it, or facts which a jury will consider equivalent to notice, did not or might not have come to the agent who received the subsequent premiums. But then it is said, that as the clause in the present case is not confined to the case of fraud, but extends to other cases, such as the insured leaving Europe without the permission of the company, the same construction must be put on the entire clause, and that if the company with the knowledge that the insured had left Europe continued receiving the premium for several years, it would be enabling the company to commit a gross fraud to hold the policy void, and thus enable the company to resist the payment of the sum insured; in answer to which I say no such consequence would follow, as I have no doubt. It would, in such a case, be competent to hold that a new contract was entered into by the insurance company, as appears to have been the opinion of the court of exchequer in *Accey v. Fernie*,¹ as to what should be the effect of such dealing after the termination of the policy by the terms of it. But then it is said that the case of *Wing v. Harvey*² is an express decision that, in a clause precisely similar, providing for one of the events provided for by the policy in the present case, namely, the assured leaving Europe, the word "void" has been held to mean voidable. I am sure nothing is further from my intention than in the slightest

¹ 7 M. & W. 151; *ante*, vol. 2, p. 266.

² 5 De G., M. & G. 265.

degree to detract from the very high authority of the very eminent judges by whom that case was decided; but it does not occur to me that in that case their attention was particularly directed to the distinction between "void" and "voidable," as ours has in the present case, nor was it in the slightest degree material to the interests of the parties in the case that it should have been; as in the case before them there was no doubt whatever that even if the word "void" had received its ordinary construction, the facts before them were quite sufficient to enable them to hold the company responsible on a new contract, or for a court of equity to prevent the company relying on the avoidance of the policy. But there is this distinction between the present case and that of *Wing v. Harvey*: in that case, the ground of avoidance of the policy was one which the court might not unreasonably have supposed the intention of the parties would have been best answered by leaving it optional with the company whether to avoid the policy or not; while, in the present case, the avoidance of the policy having [has?] been caused by the fraud of the assured. It does not occur to me that it ever could have been the intention of the parties that the contract avoided for such a cause should be capable of confirmation, as being voidable; and if, from the clause embracing several of the events, for the avoidance of the policy, I am obliged to put an uniform construction on the entire, I am of opinion it is more consonant with the principles on which our law is administered to hold, that, as fraud is one of the events provided for the avoidance of the policy, in such case the word "void" is to have its natural meaning, rather than, because other events are also provided for, to hold that, therefore, in the entire clause, we should give to the word "void" the forced construction of voidable. I am quite aware that when the law avoids a contract on the ground of fraud in one of the contracting parties, without any express stipulation on the subject, it does so merely at the election of the other party. This only shows that the common law in such cases renders a contract so obtained voidable, and not void, and does not afford much assistance to us in construing an express clause, rendering the contract void, and not voidable. In conclusion, therefore, I cannot bring myself, by any act of mine, to open this court to parties admitting themselves to have been guilty of a gross fraud; but of course, as I have the misfortune to differ from the other

members of the court, the judgment of the court will be that the defendant's demurrer be overruled, and that the plaintiff have judgment; and as we have already decided that we have a right to refer to the original policy on which the action is brought, the judgment will be entered on reading and considering not only the pleadings in the cause, but also the policy of insurance, which will be described in the judgment, and identified by the officer of the court as that referred to in the judgment.

Demurrer overruled.

See note to *Edge v. Duke*, ante, p. 71.

SUPPLE vs. CANN, Secretary of the West of England Insurance Company.

(9 Irish C. L. 1. Common Pleas, 1858.)

Statute of limitations. — To an action brought to recover the amount of a policy of insurance, the company having pleaded the statute of limitations, the plaintiff replied on equitable grounds that before the six years had elapsed, one J. B., who claimed an equitable lien on the policy, filed a cause in the court of chancery to enforce payment of it; that at the hearing before the master of the rolls, the defendants insisted that the policy had lapsed by reason of the non-payment of the premiums, and was not then subsisting; and that the master of the rolls had accordingly directed the present action to be brought to try that question, and had in the mean time retained the petition. *Held*, that the above was an equitable answer to the plea.

Waiver. — The plaintiff having in the summons and plaint admitted the non-payment of certain premiums within the required period, relied upon the receipt of the premiums by the agent of the company, as amounting either to a waiver or to a new contract for a revival of the policy. The company pleaded a condition of the policy providing a specific mode of setting up the policy in case of a lapse, within a limited period. *Held*, on demurrer, that the parties were not thereby precluded from waiving the lapse of the policy in any other mode they might mutually agree to.

THIS was an action upon a policy of assurance. The first count stated that, by a certain policy of assurance and agreement entered into between the company and the plaintiff, reciting that the plaintiff was desirous of effecting an insurance with the said company on the life of the Right Hon. Maurice Fitzgerald, of Ballinruddery, in the County of Kerry, in the sum of £500, for one year, commencing the 29th of December, 1838, and to be renewed from time to time, at the option of the plaintiff, during the continuance of said life, and that the plaintiff had made a declaration that the age of the assured did not exceed sixty-seven years; and that, on the faith of the representations so made, the company had undertaken the proposed assurance at the annual premium of £42.

The conditions of the policy, as set out in the plaint, amongst others were, that the policy should not be valid beyond fifteen days after the expiration of any year, unless the renewal premium should have been paid, but might be revived within any period not exceeding three months; and that if the party whose life was to be insured did not appear at the company's office, or before one of their agents, an additional charge of fifteen shillings per cent. was to be made in the first instance, but was to be returned if the party appeared before the second payment of the premium, and the state of his health were then approved. The plaint then stated that the said Maurice Fitzgerald did live beyond the term of one year, &c., and that the plaintiff did afterwards, during the continuance of the said assurance, pay to the company the said annual premiums, according to the terms of the policy, except the last three premiums, which became due before the death of said Maurice Fitzgerald, and that the company waived and dispensed with the actual payment, according to said policy, of the said three premiums; and waived all forfeiture and lapsing of said policy, by reason of the non-payment thereof, and afterwards received and accepted payment thereof, through John Busteed, who was the agent of the company; and that afterwards, to wit, in 1848, it was agreed between the plaintiff, through the said Busteed and the company, that said premium should be increased by the sum of three shillings and six pence per cent., and that the said company should give bonds of £80 per cent. on said policy. That the said increased premium was subsequently paid, and a bonus of £41 19s. had become payable on said policy at the time of the death of the said Maurice Fitzgerald. That said M. Fitzgerald died in March, 1849, and that no untrue statement was made, nor were there any misrepresentations, concealment, or fraud.

The second count, after stating the terms of the policy as before, averred that J. Busteed, being the agent of the company for receiving the premiums, waived and dispensed with the actual payment of the said three premiums and said increase; and in his accounts with the said company debited and charged himself with said three premiums and said increase, and became responsible to the company for the amount thereof, as if paid according to the terms of the policy; of which the company had notice and knowledge, and, having such notice, otherwise compelled and

enforced and accepted payment of said three premiums from said Busteed, and sanctioned and adopted the acts of Busteed in respect of said three premiums and increase so paid as aforesaid.

The third count alleged a new contract entered into between the plaintiff and the company, after the death of Maurice Fitzgerald, to revive the lapsed policy, upon payment of the premiums, &c.

The defendants pleaded the statute of limitations, to which the plaintiff replied on equitable grounds as follows, viz.: that within six years after the respective times of the accruing of the causes of action respectively, and within six years before this suit, said John Busteed, having an equitable charge or lien on the said policies and sum of money mentioned, instituted a suit in the court of chancery in Ireland, against the plaintiff and the defendants, for the purpose of enforcing payment to him of the said policies and sums in respect of his charge and lien; and by an order of the lord chancellor made in said suit, the defendants were directed to lodge the amount of said policies and sums in the said court of chancery, to abide the result of said suit, which the defendants did; and the cause came on to be heard before the master of the rolls, by the direction of the lord chancellor having jurisdiction to hear the same, and was accordingly heard; and that at said hearing it was contended by the defendants that the said policies had lapsed before the institution of the suit, by non-payment of said three premiums; and that, at the time of said suit, the said policies were not subsisting; nor were defendants liable on said policies, or for payment of said sums; and, therefore, in order to try that question, the master of the rolls directed the present action to be brought, and retained the chancery suit in pendency until the determination of the present action; and that said chancery suit is still pending. To this replication the company demurred, upon the ground that the pendency of a suit in chancery by John Busteed, who was not shown by the plaintiff to have had any further interest in the policy in question than an equitable lien thereon, could not operate under any circumstances to defeat the bar of the statute of limitation as against the plaintiff. The defendants also pleaded a plea setting forth the condition of the policy enabling the plaintiff to revive it, after the omission to pay the annual premium for more than fifteen days after the expiration of the year, by payment

thereof, at an increased charge, within three months, and alleging a non-compliance with these terms. To this replication the plaintiff demurred.

O'Driscoll & Lynch, in support of the demurrer taken by the defendants to the equitable replication, contended that a court of equity would not in general restrain a defendant from pleading the statute of limitations; that taking this action to be in the nature of an issue directed by the court of chancery, it was competent for the master of the rolls to have made it a part of the order that the company should not rely upon the statute; but that in consequence of the silence of the order on this point, the case should be treated in the ordinary way. They cited *Hunter v. Gibbons*,¹ *Hovenden v. Annesley*,² *Busteed v. West of England Insurance Co.*,³ *Elderton v. Lack*,⁴ *Duke of Beaufort v. Morris*,⁵ *Gulliver v. Guller*,⁶ 2 Daniell's Chan. Pr. p. 842.

C. Barry & Brereton, contra, cited *Brophy v. Holmes*,⁷ *Sloper v. Cottrell*,⁸ *Pincke v. Thornycroft*,⁹ *Mackenzie v. Powis*.¹⁰

Cur. adv. vult.

Berry & Brereton, in support of the plaintiff's demurrer to the defence, relating to the question of waiver, contended that it was competent for the parties to waive breaches of the conditions of the policy itself. They cited *Alexander v. Gardner*,¹¹ *Hyde v. Watts*,¹² *British Industry Life Assurance Co. v. Ward*.¹³

O'Driscoll & Lynch, contra, contended that the parties were bound by the original terms of their contract. They cited *Acey v. Fernie*.¹⁴

Cur. adv. vult.

MONAHAN, C. J., now delivered the judgment of the court. This case came before us upon the argument of two demurrers. The action was brought on foot of a policy of insurance. The summons and plaint states three causes of action. The first count declares upon a policy dated in April, 1839, and it alleges that all the premiums were regularly paid until 1846, but admits that the seventh, eighth, and ninth premiums were not paid in

¹ 1 H. & N. 459.

² 2 Sch. & Lef. 630.

³ 5 Ir. Ch. Rep. 574.

⁴ 2 Phil. 680.

⁵ 2 Phil. 683.

⁶ 1 H. N. 174.

⁷ 2 Moll. 9.

⁸ 6 Ell. & Bl. 497.

⁹ 4 Bro. P. C. Toml. ed. 92.

¹⁰ 7 Bro. P. C. (Toml.) 282.

¹¹ 1 Sco. 640.

¹² 12 M. & W. 254.

¹³ 17 C. B. 644.

¹⁴ 7 M. & W. 151.

time.; it then states that, after the non-payment of these three premiums, the company waived the forfeiture which had taken place, and accepted the three premiums which were due in 1847, 1848, and 1849; that afterwards, an agreement was entered into, by which the party agreed to pay an increased percentage on the premium, in consideration of which the company agreed to give her a bonus of £80 per cent. The second count, instead of alleging an agreement by the company to the above effect, avers that such an agreement was made by Busted, as the agent of the company. If this averment stood alone, it would not appear clear on the face of the plaint that Busted had authority to make such an agreement; but then follows another allegation, that the company, with notice of the fact, received the premiums from Busted, and ratified his act. Therefore, there is no substantial distinction between such an allegation of a waiver by Busted, as agent of the company, ratified by them, and one of a direct waiver by the company itself.

The third count differs from the two preceding ones in this, that instead of relying upon a waiver, the cause of action is founded upon a new contract, entered into with the company after the forfeiture, and after the death of the Knight of Kerry, the party whose life was insured, upon payment of the premiums reserved by the policy. The sixth plea was one of the statute of limitations, namely, that the cause of action did not accrue within six years next before the commencement of the suit which, at law, would have been a good defence, the policy not being under seal. To this the plaintiff had pleaded an equitable replication, which states: [His lordship read the terms of the equitable replication.] It appears that a cause petition had been filed in the court of chancery against the company, for the purpose of enforcing payment to Busted, who was interested therein, as the holder of a lien, though the legal right of action was vested in the plaintiff in this action. Now taking the plea and the replication together, the matter stands thus: A cause petition is filed by the equitable owner of the policy, within the six years; the company bring in the money, relying for their defence upon the forfeiture of the policy; but, of course, no question was or could be raised in that suit on the statute of limitation. On the hearing of that cause petition in the rolls court, the master of the rolls directed that this action should be brought for the purpose of trying the

right of the parties to the money lodged in the court of chancery, and retained the petition in the mean time. The substance, therefore, of the equitable replication is, that such a plea would be no defence to the proceedings in chancery, and is therefore equally unavoidable in the present action. The words of the 87th section of the common law procedure amendment act, 1856, relating to equitable replications, are as follows: [His lordship read the section.] A fact has been assumed, and properly so, in the argument of this case, namely, that the master of the rolls was right in sending this case as he did for trial in a court of law, there being a legal defence to the action upon the policy; but upon that assumption an argument was founded by the defendants, that if he did not intend that the company should rely upon the statute of limitations, it was his duty, by his order, to have provided that they should not rely thereon; inasmuch as he did not do so, we should not allow this replication, but instead thereof should put the parties to the expense and delay of sending back into the court of chancery for further directions. We think that we are bound to carry out the intention of the legislature, and that when we have reasonable grounds for arriving at the conclusion that the defendants would be restrained in another court from setting up this defence, we ought not to put the plaintiff to the expense of a suit in that court; and, therefore, upon what we consider to be the proper construction of the terms of this act of parliament, we hold that the facts stated in this replication are sufficient to avoid the plea. Cases have been strongly relied on by the defendant, which do not appear to us in point. The principal one is *Hunter v. Gibbons*.¹ That was an action of trespass, for making excavation under the plaintiff's land, for mining purposes. The plea was the statute of limitations. The replication to this was the fraudulent concealment by the defendant, for more than six years; to which the defendant demurred, and the demurrer was allowed, not upon the ground that the plaintiff ought to have gone for relief to the court of chancery, but, as it was put expressly by the lord chief baron, that a court of equity would not prevent a defendant from setting up this defence under the statute. That case, therefore, is no authority, with respect to the present. I have looked into all the cases which have been

¹ 1 Hurlst. & Nor. 459.

decided on this act, but I find none which are exactly analogous to the present, in relation to pending proceedings. However, we all know the common case where the statute of limitations is not pleadable in the court of chancery to a claim for the intermediate arrears of interest, by a subsequent incumbrancer, in case a receiver be in possession at the suit of a prior incumbrancer. In such a case we are not aware that a court of law would not exercise a similar jurisdiction. The case of *Wood v. Dwarries*¹ is an authority in support of the view which we have formed relative to this case. That was an action upon a policy of insurance, as here. The plea in answer to this was, that all the statements of facts therein contained were false, whereby the policy was forfeited. To that the replication was, that the company, before entering into the policy, published a certain prospectus by which they stated that they would not impeach their policies even upon the ground of fraud. The court held that that was a good replication. It may be said that it was part of the contract there, and that that decision therefore was no authority in the present case; but it shows how the matter set forth in the plea was capable of being avoided upon equitable grounds; and we have been unable to find any case in which the courts have refused to allow an equitable replication, where the matter of the replication would have been available in the court of chancery. We therefore think that the omission of the rolls order to provide for restraining the defendants from relying upon the statute of limitations is no answer to the right of the plaintiff to reply to that plea the pendency of the chancery proceedings, and that the demurrer to that replication must therefore be overruled.

With respect to the demurrer taken to the other defence, pleaded with reference to the allegation of waiver, the defence alleged that the policy contained a proviso that it should be competent for the insured, notwithstanding the lapse occasioned by the non-payment of the premium within the fifteen days, to renew the policy within three months, by performing the certain matters and things pointed out, and no other way; and that the plaintiff had not performed any of such matters and things. That only shows that in one way there might be a good revival; but though this breach of a contract, which is not under seal, might

¹ 11 Exch. 493; *ante*, vol. 2, p. 418.

Curtin v. Jellicoe.

have been waived in a particular way, and the company would have been obliged to waive, in case the other party performed the requisite acts, there was nothing to prevent the company from doing the same thing in any other way. And accordingly, in order to meet either view of the case, the plaintiff relied upon the new agreement, both as a waiver of a breach of the original contract, and as a fresh simple contract between the parties. Therefore, for these reasons, we consider that the demurrer to this defence must be allowed, and that the demurrer to the equitable replication must be overruled.

Judgment for the plaintiff.

See note to *Edge v. Duke*, ante, p. 67.

CURTIN vs. JELlicoe.

(13 Irish Ch. 180. Coram Lord Chancellor, 1862.)

Powers. Trustee. — When a policy of assurance is assigned to a trustee, who either by express terms or fair construction has a power to give receipts, the company ought not to refuse payment to the trustee.

THIS case came before the court upon a cause petition, filed under the following circumstances: —

In 1838, Edward Wilson effected a policy on his own life, with the Palladium Assurance Company; and by deed of 1841, reciting that the said Edward Wilson was indebted to Edward Henry Wilson in the sum of £200, Edward Wilson, in consideration of said debt and a further sum of £50, assigned to Edward Henry Wilson the said policy of assurance, upon trust, in the first place, to repay himself the debt, and subject thereto, upon trust for himself absolutely.

By deed bearing date the 10th day of August, 1852, and made between the said Edward Henry Wilson of the first part, the petitioner, Daniel Curtin of the second part, and the petitioner, Henry Noblett of the third part, said Edward Henry Wilson assigned to said Henry Noblett the said policy of assurance, “with full power and authority to and for the said Henry Noblett, his executors, administrators, or assigns, in his own name, or in the name of the said Edward Henry Wilson, his executors or administrators, to ask, demand, sue for, receive, and recover the said sum of £500,” secured by the policy, to hold

upon trusts to indemnify Daniel Curtin against losses from his being surety for Edward Henry Wilson. The insurance company received notice of those assignments.

In 1856, Daniel Curtin was obliged to pay large sums as surety for Edward Henry Wilson, and in 1859 obtained a judgment against him for £1,119, balance due to him after giving credit for £500, the amount of the policy. In 1856, the business of the Palladium Company was transferred to the Eagle Insurance Company, which undertook liability for the contracts of the Palladium Company.

In November, 1859, Edward Wilson, the life assured, died, and the petitioner Curtin applied to the company for payment of the amount due; and various letters were written by him, and on his behalf, offering to sign receipts, and procure the junction of Noblett in any receipt or discharge necessary; but the company declined to pay without Edward Henry Wilson joining in the receipt, which he declined to do. The company had obtained possession of the policy and assignment, and did not restore them, though applications for them were made.

The cause petition was filed by Curtin and Noblett, who joined with them as petitioner, by virtue of their power of attorney, Edward Henry Wilson, against Mr. Jellicoe, the public officer of the Eagle Insurance Company. Edward Wilson had no personal representative.

Mr. Sergeant *Sullivan*, Mr. *Brewster*, & Mr. *O'Brien*, for the petitioner.

The *Solicitor General* & Mr. *Flood*, for the respondent. The petitioners Noblett and Curtin could not discharge the company, which had notice that Wilson claimed rights against the policy. Noblett never demanded payment to himself; Curtin only made the demand, and a payment to him would not have been justified by the assignments. *Ford v. Ryan*,¹ *Glynn v. Locke*.²

THE LORD CHANCELLOR. I think that both sides have erred to some extent in this case. The petitioner, Mr. Curtin, acted wrongly in not requiring payment to be made to the trustee, Mr. Noblett; he only asked for payment to himself, and offered to have a receipt given by Noblett. [Mr. *Brewster*. If that was the objection of the company, it would have been their duty to say,

¹ 4 Ir. Chan. Rep. 347.

² 3 Dr. & War. 11; S. C. 5 Ir. Eq. Rep. 61.

We will pay to Noblett and not to you.] I think that the petitioner was wrong in seeking payment to Curtin, though the company might fairly have answered by saying that they would pay to Noblett. I was also much struck with the frame of the suit, avoiding all the questions between Wilson and Curtin.

I have, however, a very clear opinion that insurance companies are not bound to look beyond a trustee, who, either by express terms or on fair construction, has a right to give receipts; and I therefore think payment to Noblett ought to be made, and that he has full power to receive the sum due.

SCOTLAND.

JOHN CAMPBELL vs. ROBERT ALLAN, agent for the Westminster Insurance Society.

(9 Morrison's Decisions, Appendix, Insurance, 13. Court of Session, 1800.)

Restitution of premium refused, although the policy was null for want of interest, in terms of 14th Geo. 3, c. 48.

JOHN CAMPBELL insured £2,000 for one year on the life of Thomas Allan, with his father Robert Allan, agent in Edinburgh for the Westminster Insurance Society, and paid £24 18s. as the premium.

Mr. Allan immediately after wrote the society, 25th May, 1793: "I now hand you orders from John Campbell, for his brother James Campbell, of Calcutta, to insure £2,000 for one year on the life of my son Thomas Allan, born 17th July, 1777, aged near sixteen.

"My son is before me in the counting-house; I warrant him not sixteen and in perfect health. Mr. Campbell has a purpose to serve, of which I know not; he named my son as being a good life, and least trouble attending it."

Thomas Allan survived the year.

In 1798, Mr. Campbell raised an action against Mr. Allan for repetition of the premium on the following statement:—

The pursuer's object in entering into the policy in question was, as explained to the defender at the time, to insure £2,000 for a year on the life of his brother, Dr. Campbell, of Calcutta. In conversation with Mr. Allan on the subject, the pursuer learned that a policy on Dr. Campbell's life would be very expensive; but the defender suggested that the object might be effected by insurance on the life of some indifferent person in this country, and proposed his son, who happened to be in the office at the time. The pursuer agreed, and paid the premium.

The pursuer was at this time shown by Mr. Allan outlines of the rules of the society, from which it did not appear that the transaction was unsafe or illegal. But it now turns out, that, as

the pursuer had no interest in the life of Thomas Allan, the policy was null from the beginning, by 14th Geo. 3, c. 48, of which the pursuer was then ignorant, but which was explained in a small treatise, afterwards published by the society.

On that account, the pursuer could have recovered nothing if Thomas Allan had died within the year, and is therefore entitled to restitution of the premium, because he was misled by Mr. Allan from his ignorance of the law, or culpable inattention, and at any rate *condictione sine causa* as no risk has been run by the society. 2 Cowper's Reports, p. 666, &c., 18th November, 1777, *Tyrie v. Fletcher*; D. Lib. 12, Tit. 5; L. 2, § 2; L. 6; Lib. 12, Tit. 7; L. 1, § 2, 3.

Mr. Allan admitted that Mr. Campbell had at first mentioned his intention of insuring on the life of Dr. Campbell, but added, that he did not explain the nature of his interest; that from his readily going into the proposal of substituting the defender's son, the defender was led to believe that the interest in view would thereby be secured, and by instructions from the society, who sisted themselves as parties, he resisted the demand; contending, — It would be extremely dangerous to the society to admit claims of repetition of premiums after the policy has expired, upon averments of want of interest on the part of the insured, who must be held to have had, at entering into the insurance, some substantial interest in view, best known to themselves. In such case, there can be no concealment of fact on the part of the society, or their agents; and both parties are equally presumed to know the law.

When a policy is originally effectual, but the risk does not take place in consequence of some intervening occurrence, the premium must be returned; but here the averment is, that the policy was illegal and null from the beginning, and, *in pari casu*, *melior est conditio possidentis*. 2 Douglas, 468, King's Bench, 1780, *Lowry v. Bourdieu*.

The LORD ORDINARY reported the cause on informations.

Observed on the bench: The pursuer had not sufficiently explained his object in making the insurance. He might have had an interest which might have been effectually secured by it, and the defender had no title to investigate its nature.

No bad intention has been established against him; and supposing the misapprehension to have been mutual, *in pari casu melior, &c.*

Forbes v. Edinburgh Life Assurance Company.

The lords unanimously assolizied the defenders.

A petition containing reference to oath of Mr. Allan as to what passed at entering into the policy was (18th February) refused, without answers; the questions proposed to be put to him having been considered as irrelevant.

Lord Reporter, *Cullen*; Act. *Ar. Campbell*; Alt. *Thomson*; Clerk, *Menzies*.

Fac. Coll. No. 158, p. 353.

SIR WILLIAM FORBES & Co., pursuers, *vs.* EDINBURGH LIFE ASSURANCE Co., defenders.

(10 Court of Session Cases, 1st series, 451. 1832.)

Waiver. — Where payment of a policy on a life was resisted on the ground that a dangerous habit of opium eating was not disclosed, and the judge directed the jury to consider whether a question regarding habits remained unanswered, and if so whether this did not imply a waiver or abandonment of the inquiry into the habits: *Held*, that he should have told the jury that such implied abandonment or waiver did not relieve the assured from making a disclosure of every fact material to be known.

Warranty. — The party whose life was proposed having signed a declaration that he was in perfect health, and the general state of his health was good; and the party proposing his life having made the truth of that declaration a fundamental condition of the policy: *Held*, that an express warranty was undertaken that the life was not more than usually hazardous.

Bonâ fide statements. — Question raised whether a party *bonâ fide* insuring on the life of another, believed to be sound, and so stated, can recover, in respect of his *bona fides*, though the life is unsound.

THE pursuers raised an action against the defenders, alleging that William Inglis, W. S., had drawn a bill, dated 2d November, 1825, for £7,000, on the then Earl of Mar, by whom it was accepted; that it was discounted with them by Inglis, and protested for non-payment on 30th May, 1826; that in security of £3,000 of this debt, Inglis effected an insurance on the life of the earl, with the defenders, who, on the 26th September of that year, bound themselves by a policy to pay the amount on the death of the earl; that this policy was assigned to the pursuers, and that the earl died on 20th Sept. 1828, but the defenders refused to pay the amount.

The defenders admitted that they had granted the policy, but denied their liability, on the ground that they had been led to effect the insurance at the ordinary premium, as on a good insurable life, by misrepresentation, or not having been made ac-

quainted with facts relative to the habits and state of health of the Earl of Mar, material and important for them to know in determining whether they would undertake the insurance of his life on the terms proposed, or on any terms. These habits, they alleged, consisted in making use internally of opium, laudanum, and spirituous liquors, to a great and dangerous extent, which had impaired his health, and rendered his life either a hazardous insurance, or not insurable at all. They alleged that these facts had been misrepresented, or withheld from them, when they granted the policy.

The following was sent to a jury: "It being admitted that on the 26th of September, 1826, the defenders granted the policy of insurance No. 6 of process, whereby, in consideration of a certain premium the defenders agreed to pay William Inglis, writer to the signet, the sum of £3,000 sterling, on the death of John Thomas, Earl of Mar, and that the right to the said policy is now in the pursuers. It being also admitted that, on the 20th of September, 1828, the said earl died: Whether the defenders are indebted and resting owing to the pursuers in the said sum of £3,000, contained in the said policy?"

The case was tried before the lord chief commissioner and Lord Cringletie.

The pursuers put in evidence the bill, and a proposal of insurance and declaration, dated 26th August, 1826, signed by the earl, which, after stating his age, contained the following questions and answers:—

<i>Questions.</i>	<i>Answers.</i>
Present and general state of health?	At present in perfect health, and general state of health good.
If at any time been afflicted with insanity, gout, asthma, dropsy, liver complaint, or been subject to consumption or spitting of blood, fits, hernia, or any other disorder tending to shorten life?	Has never been afflicted, or subject to any of these complaints.
Reference to a medical man (if possible to the usual medical attendant) to ascertain the present and general health of the party to be assured?	Dr. George Wood, Edinburgh.
Reference to a private friend for the like purpose.	Mr. Matthew Weir, W. S.

The pursuers next put in a declaration by Inglis, indorsed on

Forbes v. Edinburgh Life Assurance Company.

the above schedule, in these terms : “ I, having an interest in the life of John Thomas, Earl of Mar, the party mentioned on the other side, do hereby declare that the preceding statement of his present and general health, age, and everything therein contained, shall be the basis of the contract betwixt me and the said Edinburgh Life Assurance Company. And if any of the facts set forth in the above proposal be not truly stated, then all moneys which shall have been paid on account of the assurance to be made in consequence hereof shall be forfeited, and the assurance itself absolutely null and void. Dated at Edinburgh, the nineteenth day of September, 1826.”

They also put in a letter addressed by the assurance company to Mr. Weir, as the party to whom reference was given for information regarding the present and ordinary state of Lord Mar's health, accompanied by these questions, to which the annexed answers were returned by Mr. Weir : —

Have you seen his lordship lately, and how long since ?	} I saw his lordship on the 19th of last month.
Was he then in good health ?	} He then appeared in perfect health.
Do you believe he is now in good health ?	} I have every reason to believe he is so still.
What is the general state of his health ?	} His general state of health is good.
How long have you known him ?	} For a good many years.
Have you at any time known him to be afflicted with insanity, dropsy, liver complaint, or been subject to consumption, gout, fits, asthma, hernia, spitting of blood ?	} I have not.
Has he any other disorder which has a tendency to shorten life ?	} Not to my knowledge.
Can you give any and what information respecting his habits ; whether active or sedentary, temperate or free ?	} He takes moderate exercise, and is temperate in his living.
Do you know any reason why an assurance on his life would be more than usually hazardous ?	} I know of none.

A similar letter was put in, addressed to Dr. Wood, as the medical referee, containing the following questions and answers : —

- Have you seen his lordship lately, and how long since ? } Very lately.
- Was he then in good health ? } He was.
- Do you believe he is now in good health ? } I do.
- What is the general state of his health ? } Good.
- How long have you known him ? } Many years.
- Have you at any time known him to be afflicted with insanity, dropsy, liver complaint, or been subject to consumption, gout, fits, asthma, hernia, spitting of blood ? } I have not.
- Has he any other disorder which has a tendency to shorten life ? } I believe he has not.
- Can you give any and what information respecting his habits ; whether active or sedentary, temperate or free ? } He is active. He is temperate.
- Do you know any reason why an assurance on his life would be more than usually hazardous ? } I do not.
- Are you the ordinary medical attendant on him ? If so, for how long ? } From his lordship never residing in Edinburgh, I have not had occasion to attend him professionally.

The policy dated 26th of September, 1828, and the assignation and intimation thereof, besides other documents not necessary to be noticed, were also put in. Many witnesses were adduced by both parties, and particularly by the defenders, as to the extent to which the earl had been addicted to the use of opium, laudanum, &c., in 1826, and for a long period previously, and down to his death in 1828 ; and regarding the materiality of the fact of such a habit, as requiring to be communicated to an assurance company, when asked to grant a policy. It appeared that Dr. Abercrombie, of Edinburgh, had been called to see the earl once or twice in 1825.

The lord chief commissioner, (as set forth in a bill of exceptions, afterwards recurred to in the court of sessions,) “ in directing the jury, told them that insurance is a contract of indemnity, and is of a most sacred nature, in which the material facts must be disclosed, whether the subject is a ship, a house, or a man. In all of them, there is a sum paid to get indemnification in the event of a loss ; and as the premium is in proportion to the risk, con-

cealment voids the policy ; but the party objecting must make out, to the satisfaction of the jury, that the fact was material. His lordship then directed the jury to consider the certificate of Dr. Wood, as to the questions put respecting the habits of the Earl of Mar. That by the paper it appeared that there was no answer given to the question, ' Can you give any, and what information, respecting his habits ? ' That to the next question, ' Whether active or sedentary ? ' Dr. Wood answered, ' He is active. ' To the next question, ' Whether temperate or free ? ' he answers, ' He is temperate. ' The lord chief commissioner told the jury that they must consider whether the first question remained unanswered ; and if unanswered, whether this did not amount to a waiver, or an abandonment of the inquiry, as to the Earl of Mar's general habits.

" The counsel for the defenders contended, that the lord chief commissioner should have told the jury that it was the province of the court to construe the certificate as a written instrument, and that he should not have left it to the jury to put a construction upon it, and that those questions were not to be construed separately, but that the first question was to be considered as a preface to the two last questions ; and that by answering the two last questions, Dr. Wood had fulfilled the object of the defenders in the inquiry, and answered to the whole. And the counsel for the defenders farther contended, that, even assuming that a separate general question as to habits had been intended, the defenders remaining satisfied without a specific answer to the general question, could not be in law considered as a waiver or abandonment of the objection to the validity of the insurance arising out of their not having been made acquainted with a fact material and important for them to know in judging of the risk ; and the said counsel contended, that the lord chief commissioner should have directed the jury to consider whether the habit instructed by the defenders' evidence was not a fact material to the risk, or which the insurers might reasonably consider as material, and that if they (the jury) were satisfied of this, then that the policy was void, seeing that the defenders were led to effect the assurance in ignorance of the habit ; and the said counsel also contended, that over and above the implied warranty which exists in all cases of the kind, the defenders were entitled, from the terms of the documents on which the policy was entered into, to hold

Lord Mar's life to be a sound one, and about which, either as regards habits or otherwise, there existed nothing to render an assurance on his life more than usually hazardous, and that upon all, or one or other of those grounds, the lord chief commissioner should have directed the jury to find a verdict for the defenders. But the lord chief commissioner, as there was no evidence to instruct that the assured (William Inglis) knew of the habit of the Earl of Mar, left it to the jury, if they were satisfied on the evidence on the whole case, to find a verdict for the pursuers."

A verdict was found by the jury for the pursuers.

The defenders made a motion in the jury court for a new trial, on the ground of misdirection by the judge, and on the ground that the verdict was contrary to evidence.

While the motion was in the course of being discussed in the jury court, its jurisdiction was abolished by the statute 1 Will. 4, c. 69, which transferred that jurisdiction to the court of session. By the arrangement of parties, it was then agreed that the case should be heard in this court, as if the trial had taken place after the union of jury trial with the court of session, and the case was argued on a bill of exceptions to the charge of the judge, and on a motion for new trial.

Pleaded for the defenders: 1. The verdict was contrary to evidence. It was established that Lord Mar indulged the habit of opium-eating to such excess as to make his life more than usually hazardous, — a fact material to be disclosed, but which was not disclosed.

In tendering a life, as the subject of insurance, it is a fundamental principle of the contract that there shall be full communication to the assurer of every fact material to the risk of the proposed life, or which the assurer may reasonably think material. Even the innocent non-communication of a material fact voids the policy as completely as wilful concealment or misrepresentation; because, in all these cases equally, the risk, as tendered to the assurer and accepted by him, is not the actual and existing risk. By the relative position of the parties, and also by the express declaration of Inglis, Lord Mar was his agent in emitting his signed answers, which included both the state of his lordship's health and the nomination of the referees. Therefore non-communication in these answers was as fatal to the policy as if made by Inglis himself; and under the implied warranty in

making the reference, the statements by the referees formed part of the basis of the contract between Inglis and the defenders. But in the signed answers, Lord Mar had expressly stated that he was then "in perfect health, and his general health was good." He had also referred to Dr. Wood, who had never attended him; and he had omitted all notice of Dr. Abercrombie, who had attended him.

2. But, independent of the verdict being contrary to evidence, it had been returned in consequence of misdirection by the judge.

His lordship had failed to construe the document containing the questions and answers of Dr. Wood, the medical referee. It was the province of the court to construe this written instrument; in place of which his lordship had left it to the jury to say whether it purported a waiver of inquiry as to Lord Mar's general habits. His lordship should have told them that there was no such waiver, as the subsequent general question put to Dr. Wood, whether he knew any reason why the life should be more than usually hazardous, showed that there was no such waiver. But, besides, his lordship should have told the jury that even had there been a waiver, it did not relieve the assured from the necessity of fully disclosing every material fact. In place of this, the charge, as given, implied a contrary doctrine. His lordship had further assumed that there was no evidence of the privity of Inglis to Lord Mar's habit; while there was, on the contrary, such evidence on that point as ought to have been laid before a jury; and the direction to the jury implied that the privity of Inglis was an essential element in the question whether the policy was void; whereas, it was a matter of total indifference to that question, because Lord Mar was both expressly and impliedly the agent of Inglis, and the statement of Lord Mar was the statement of Inglis.

Answered by the pursuers: 1. In considering a motion for new trial, on the ground that the verdict is contrary to evidence, it is not enough for a party to induce the court to draw, from the evidence, a different inference from what the jury has drawn. It is only where a verdict is so extravagant that all reasonable men are astonished at it, that the court can grant a new trial on this ground.

There was evidence sufficient to give the jury a right to determine whether the habit of opium-eating (in so far as they held it

proved, which was a question for them) had been injurious to Lord Mar's health. This habit affects constitutions variously. The jury had reason to be satisfied that it had not hurt Lord Mar's health at the date he signed his answers. These answers, in stating his health to be good, consequently contained no misrepresentation, or non-disclosure; and no question was put to Lord Mar about his habits, nor was it material to state any which had not hurt his health. The answers of the referees were no part of the basis of the contract, and, at any rate, were honestly given by them. Lord Mar's reference to Dr. Wood was given in the best faith, as Dr. Wood had long known him. The attendance of Dr. Abercrombie had been so casual that there was no breach of warranty in not referring to it.

The defenders had no right to a disclosure of every fact which they might think material, or likely to have influenced their inquiries, before granting the policy. The fact not communicated must be proved to be material. Neither was the statement made by the referees any part of the basis of the contract; it was solely Lord Mar's own statement which was so. Even if it were otherwise, the referees were only asked to state what they knew, and they had honestly done so. Therefore, the statement made by them did not affect the validity of the policy.

2. There was no erroneous direction of the judge. Regarding the waiver, his lordship had merely left to the jury to say whether there was evidence to satisfy them that a particular question was unanswered? and whether the defenders, by accepting the non-response, were not proved to have waived the inquiry? This was limiting the jury to their appropriate function of deciding on the import of the evidence laid before them regarding the conduct of the defenders. Nor was his lordship obliged to construe that there was no waiver, and to direct to that effect.

He was correct in assuming that there was no evidence of Inglis's privity; and there was no charge given, nor any doctrine laid down, to the effect that such privity was essential to avoid the policy. On the contrary, the case was left generally on the whole evidence to the jury.

The LORD CHIEF COMMISSIONER. My lords, this case has been admirably argued at the bar. It has been long in my mind, and that the opinion which I have formed on it may be under-

stood, I must call the attention of your lordships to the manner in which it has come before the court in its present shape. It was tried on a general issue in these words:—

“Whether the defenders are indebted and resting owing to the pursuers in the sum of £3,000, contained in the policy.”

The policy, as your lordships know, was on the life of the late Earl of Mar.

It is material, in considering the bill of exceptions, to bear in mind that the case was tried under the general issue.

The history of the case is shortly this: After the trial, (in March, 1830,) which occupied twelve or fourteen hours, the jury found a verdict for the pursuers. There was no exception taken to my direction in point of law, nor any intimation at that time of moving for a new trial; but in the following session of the court within the regular time, a new trial was moved for, founded both on the ground of misdirection by the judge in matter of law, and on the ground of the verdict being contrary to evidence. The misdirection of the judge then contended for was the same with that which has found its way into the first branch of the present bill of exceptions.

The case went on, and the arguments for the new trial were not concluded till the 5th or 6th of July, 1830. Lord Mackenzie sat with me and heard the arguments for the new trial, and the matter being so various and important, we took time to consider, and had several conversations on the subject. I looked very minutely into the cases, and reëxamined very carefully the doctrine which I laid down at the trial, and I have no hesitation in saying that I then began to entertain doubts of that doctrine. This is not material, in so far as it refers to myself, but as it may bear upon any future proceedings in the many cases which may be brought forward as to insurance on the same life, it is material.

Lord Mackenzie and I found it impossible to deliver the opinion of the court before the 10th of July, when the session closed; and when the winter session began, we found it out of our power, for the jury court had in the mean time been abolished without any provision in the act of parliament to enable it to conclude the depending causes. In this situation a number of difficulties occurred, which led finally to the case appearing here in its present shape.

It appeared to me that the only certain way of settling all the

points which the case embraced, was for the parties to agree to have a bill of exceptions, so framed as to settle all matters of law ; and, at the same time, to revive the motion for the new trial, on the verdict being contrary to evidence. It was material to have the bill of exceptions, because I thought that there were reasonable grounds to suppose that I was wrong in the legal doctrine which I laid down at the trial in respect to what was called the waiver or abandonment of inquiry into certain habits of the Earl of Mar, which had not been disclosed to the insurers. The doubts which I began to entertain were first suggested to my mind by an attentive perusal of the case on a policy on the life of Sir James Ross, which was tried by Lord Mansfield in 1780. In that case Lord Mansfield lays down distinctly all the law which I shall think it necessary to refer to in the consideration of the case before us, without going into the detail of the subsequent cases which have been referred to at the bar.

The case of Sir James Ross¹ embraces the question of non-disclosure or concealment. It appears from that case that full disclosure of all that is known to the party making the insurance is a duty, but that if the assured and assurers are both equally ignorant, that the assurers must stand the risk, and I am not aware that either in principle, or by any decided case, that doctrine has been shaken. This was very important in considering the question of misdirection, as it affected the motion for a new trial. It did not appear at the trial that Mr. Inglis, the assured, was in the knowledge of the fact of the Earl of Mar's taking laudanum to excess, which was the concealed habit on which the insurers refused to pay the sum insured. I considered it to be most material that this should be brought into the view of your lordships in delivering judgment upon the new trial in this case, because if a new trial had been granted on my misdirection, on the ground of waiver or abandonment of inquiry into the habits of Lord Mar, that ground would have been rebutted by the fact of Mr. Inglis's ignorance ; and as he was not proved to have been in the knowledge of the fact, the granting of a new trial would have been abortive, as his ignorance relieved him from the effect of non-disclosure, and kept the insurers liable under the policy. Now, all this is cured by the bill of exceptions.

When I signified my readiness to have the bill of exceptions by agreement of parties, I intimated that I should sign any bill

¹ *Ross v. Bradshaw*, 1 W. Black. 312.

which excepted to what I was conscious of having stated at the trial as direction in matter of law, and of course to sign whatever law I had omitted to state, and which ought to have been stated.

Having said this, I shall begin by making a few observations on the form of bills of exceptions. It has been correctly said at the bar, that I have lately been in correspondence as to bills of exceptions with the highest English authorities, — the lord chief justice of the king's bench, Baron Bayley, and other judges.

Lord Eldon had laid it down in the second appeal in Lord Fyfe's case, and desired it to be particularly attended to, that the party who excepts should state the grounds of law that he contended for. From that time it was the constant habit of the jury court to require the parties who except to state their views of the law. It became doubtful how far this was proper and necessary, and the correspondence to which I have alluded then commenced. The result of that correspondence has been (with the approbation of Lord Eldon) the adoption of the opinion of Lord Tenterden, — that it was better to leave parties to their own discretion, and to allow them to state or not to state their views of the law, according as they should judge most expedient. It was apprehended that there might be some cases which required the law, as contended for by the parties, to be fully stated; and, on the other hand, there might be cases where it would be better simply to state the law excepted to, — and that there could be little difficulty in the court, with a bill of exceptions drawn in either form; and in conformity to this the present bill has been drawn. It partly coincides with the previous practice, and partly does not; and I think it right to announce to the gentlemen of the bar, that in future, parties are to be at liberty to exercise their discretion either in stating the law as contended for by themselves, or in not stating it.

Having made these few preliminary observations, I now come to the merits of the case.

This bill contains three branches: First, an exception to the law, which I laid down at the trial respecting the waiver or abandonment of the inquiry into Lord Mar's habits. The second relates to the warranty, not implied, but express; the third excepts to the statement as to the materiality of Mr. Inglis's ignorance of the fact of the habit.

Now, as to the first of these, counsel have not only objected to

the directions given, but they have also stated the law contended for by them. As to the second, they say that I ought to have directed the jury, as there was an express warranty, to find a verdict for the defenders. And, on the third point, they merely say that I did wrong in directing the jury to find for the pursuers, if they were satisfied that it was not established by the evidence that Mr. Inglis knew that Lord Mar was in the habit of taking opium to excess.

On the first point, which relates to the direction which I gave at the trial respecting the question of waiver, I shall be very short.

When a judge makes up his mind at a trial, more especially where it has lasted for many hours, and is obliged on the instant to address the jury, if his opinion in matter of law is objected to, he is bound to reconsider it with great care. But such is the structure of the human mind, that the effect of a change of opinion is likely to give a dangerous tendency to the other side, and to create an undue bias against the original opinion. I have endeavored to fortify myself to the utmost against this tendency. I have examined this case with very great anxiety. I may say I have devoted my mind to it both by day and night; and the result of my deliberations, and my examination of the decided cases is, that I was mistaken in the law I laid down at the trial. I do not think that the law stated by the counsel in the bill of exceptions is correct; and as this case may go further, and as, in the last result, it is material that the ground of judgment should be known, it becomes me to observe in what respect I consider the opinion I gave at the trial to have been erroneous.

I stated to the jury that they were to consider whether, because Dr. Wood did not answer the first question as to the habits of Lord Mar, this was not to be held as an abandonment or waiver of the inquiry as to such habits; and if abandoned, whether they, the insurance company, could now set up the habits against the payment of this insurance?

Now, it is stated that I ought to have construed the instrument, and that I did not construe it, but left it, contrary to law, to the jury to construe. But I could not let the case go to the jury without having construed the instrument, and without being satisfied that the three questions were separate, and that the two particular questions which followed the general question were not

a repetition or exposition of the general question. I thought that they were all separate questions, and I think so still; and I am confirmed in this, for it coincides with the opinion of Lord Lyndhurst, in the case which has been cited by the defenders. I am also confirmed in it by the case as stated in the pleadings of the defenders themselves. Look at the pleas in law; the defenders state the question as to habits not being disclosed as the ground of their resistance to pay. Now, the two questions as to his being "active or sedentary," "temperate or free," were answered, and the pleas in law could have no reference except to the first general question. What I say ought to have been the law stated by the defenders is this: that an implied abandonment, or waiver, does not relieve from a distinct and conscientious obligation to disclose everything material; that the law enforces the performance of such obligations as are binding on conscience; and that such obligations are more especially enforced in contracts of insurance. Now, this I conceive is the correct law, and on a most deliberate review of all the cases and principles, this, I now think, is the law which I ought to have laid down at the trial. If the case, therefore, turned solely on the question, how far I mistook the nature and construction of the instrument, and the obligations arising from it, I am now clearly of opinion that I ought to have directed in the above terms. And this is of extreme importance, because it was evident that the doctrine, as laid down by me at the trial, had great weight with the jury in forming their verdict.

All this matter is to be got in Lord Mansfield's summing up in the case of Sir James Ross. He lays down the doctrine of the necessity of fairness, and the effect of disclosure and non-disclosure; and the more you examine it, the more apparent it is that that case comprises everything of importance in the questions raised here. Suppose, then, that the present case had been left in the position in which it stood under the direction I gave at the trial being erroneous: if this were the question for the new trial only, and not the question on the bill of exceptions, I should say, on the ground of misdirection in law, that the new trial ought to be granted. But in considering the effect to be given to this part of the bill of exceptions, we must also keep in view the situation of Mr. Inglis. Now, if Mr. Inglis was ignorant of the habits, (and the evidence does not prove that he was acquainted with the

habits of Lord Mar,) that would have counterbalanced the effect of my misdirection, and the granting the new trial would have been useless and unjust. On this point there does not appear to be any evidence tending to instruct that Inglis was informed. If that be so, I think the verdict of the jury (had no other question been raised by the bill of exceptions) must have been against the party who excepted. But the case takes a very different shape, in my mind, when I come to consider what I have called the central or second exception, which stands between the two others; I mean the warranty. This exception cost me a considerable degree of — I will not say trouble — but of care and attention, in order to see how it was brought forward; for at the trial there was nothing whatever agitated but the concealment or misrepresentation as to the habit. The whole question on both sides turned on it, and almost all the law which arose at the trial turned on it; and if anything else turned upon it, it escaped me at the time, and it escapes me now; but it makes no difference in regard to the result. It comes exactly to the same result, according to the opinion I am about to give.

I have examined the proceedings, and I have stated that this is a general issue, which embraces every question that can arise in a case. In all policies, whether on lives, houses, or ships, the great load of the case generally rests on the defender; and the general issue takes in all his grounds of defence. In an insurance on ships, it takes in the question of seaworthiness, — not departing with convoy, deviation from the voyage, and so on; and so in life insurances, the general issue admits all grounds of defence, unless they should be matter of surprise by being unnoticed in the previous pleadings. Now, I find in the defences, the first paper put in, the defenders set forth, almost *ipsissimis verbis*, the precise objection that is taken in the shape of exception under the head of warranty. They state in the defences that the life insured was not a sound one, — that it was more than ordinarily hazardous to insure it, — that there was a disease tending to shorten life. Now these are the heads that are incorporated in the second or central exception, in which it is stated, that as this was a warranty arising out of the documents, it must be considered as a case where it was necessary to prove the warranty completely; and the judge should have told the jury, that if they were satisfied that the warranty was not made out, they should find for the defenders.

This leads to the consideration of two questions, — the one a question of law and the other of fact. With regard to the question of law, it is to be derived from the case to which I have alluded — the case of Sir James Ross. Lord Mansfield lays down the distinction between warranty and fraud; and with regard to warranty, he says, If litigated, it must be proved, — so that a warranty supersedes all other questions. Accordingly, it annihilates the question that relates to Mr. Inglis's ignorance or knowledge. It renders it unnecessary to enter into the question. His ignorance is of no consequence; he must make good his warranty.

The next question is one of fact, and it is divided into three parts.

The first branch relates to the papers signed by the Earl of Mar, in which he declares that he is then in perfect health, and that his health is generally good. This is a declaration of the state of his health; and in that declaration by Lord Mar, Mr. Inglis indorses on the back of it his proposal to the company, and the insurance is made; and the terms of it are, that if what is contained in the preceding paper is not true, the policy is void, — (and the assured must prove it true.) Here, then, Mr. Inglis confirms the terms of that warranty.

But then, there come the answers of Dr. George Wood and Mr. Weir, and they are subsequent. These are, that there was no disease in the Earl of Mar tending to shorten life, or to render insurance more than ordinarily hazardous. These, likewise, are declarations of warranty. It may be said that they affect Mr. Inglis on the one hand, because they are *pars ejusdem negotii*; and on the other hand, that they do not affect Mr. Inglis, because they were not made with his knowledge or sanction, or by his desire. In the case of Duckett, Lord Lyndhurst directs answers, standing precisely in the same situation with those given by Dr. Wood and Mr. Weir in this case, to be taken by the jury into their consideration as affecting the assured. The presumption therefore is, so far as it can be discovered, that he thought them *pars ejusdem negotii*. But the solution of this question, as to whether Mr. Inglis was cognizant of these answers of Dr. Wood, or not, does not seem to be material at present; because, if I am right, and if the court agrees with me in opinion, that in this part of the bill of exceptions there must be a judg-

ment in favor of the bill, it then follows, as a necessary consequence, that if it goes down to trial, the fact of Mr. Inglis's knowledge or ignorance will be inquired into; but at any rate, I am conscious that I summed up nothing to the jury on the head of warranty, and the omission of a judge in not bringing the attention of the jury to an important point of law is as much a ground for a bill of exceptions, as stating law which is erroneous. If any of your lordships will take the trouble of looking into Lord Eldon's able speech in Lord Fife's first trial, you will find what a judge must do, and that his faults of omission are as much subjects of exception as those of commission.

Now, what I suppose is contended for here (and what I admit was the duty of the judge) is, that the jury should have been told, that in the case of Lord Mar there is a warranty of perfect health, and general good health; and Mr. Inglis's proposal proceeds upon the truth of that statement. I might then have gone on to say, there are likewise warranties contained in the answers of Dr. Wood and Mr. Weir. They may not apply to Mr. Inglis; but it was for the jury to consider whether it was made out in proof that Mr. Inglis, the insurer, was affected by a knowledge of them. At any rate, it goes to trial again if the exception is allowed, and it will be seen then, in point of fact, whether Mr. Inglis was cognizant of Dr. Wood and Mr. Weir's answers or not. In case he was not cognizant, there is then only one head of warranty — the warranty of health.

Now we come to the evidence. The evidence almost turns entirely on the subject of the habit, and of the dangerous nature of the extent of the habit, and the reasoning is also all on the habit. The question to be put to the jury is — whether the taking of opium takes away the representation of perfect health? The law of warranty must be laid down. It must be laid down and applied to the case, and then it must be left to the jury to decide whether they think this warranty fulfilled or not. That was not done, and therefore there was error. With regard to those questions that fall under Dr. Wood's answer, they came more home as applicable to the subject matter of the habit. "Whether he knew any reason why an insurance on Lord Mar's life would be more than usually hazardous?" is a question more extensive, and gives greater latitude for the consideration of the jury with regard to their finding. But at all events, it is clear on my mind

that, to try this case well, it ought to be tried in this way ; and, on the subject of warranty, it is clear that it absorbed the other points, and leaves the question for the jury on the warranty alone.

With regard to the motion for a new trial, on the ground of the verdict being contrary to evidence, which is all that I presume now remains behind, I shall be short. I always think it advisable that when a new trial is applied for, on the head of the verdict being against evidence, that the court, in stating their grounds in sending it to a new trial, should do it with as much caution as possible, and that they should be as careful as possible in giving an opinion as to the effect of the evidence ; because if a strong opinion is expressed by the court, the case goes down with more or less disadvantage to a second trial, which is often injurious to the fair decision of the case, which ought by all means to be sent down to the second jury as pure as possible. In this case such risk may be avoided, as it must go to another trial on the misdirection. As I have observed that what I said at the trial was a misdirection, I am bound in justice to add, that it is my clear impression that what I say on the waiver of the habit had great weight in causing their verdict ; for the jury, a very respectable one, retired, and in a very short time found for the pursuers ; their consciences, as I conceive, being satisfied that the waiver was a good ground for their verdict. Accordingly they did not take sufficient time to examine into the evidence. In fact, it was a verdict without due and sufficiently deliberate consideration of the evidence. Under all these circumstances my opinion is, that the bill of exceptions ought to be allowed, and that the rule for a new trial should be made absolute.

Lord BALGRAY said that the lord chief commissioner had explained most distinctly the grounds on which he wished the bill to be allowed, and the new trial to be granted ; and he fully coincided with his lordship.

Lord CRAIGIE concurred.

Lord GILLIES said he was of the same opinion. But he thought that the new trial must be granted, not only on the bill of exceptions, but also on the ground that the verdict was against evidence. He added, that if their lordships allowed the bill, that judgment could be appealed from ; and if they granted a new trial, as in the case of a verdict being contrary to evidence, that judgment could not be appealed from ; and perhaps, therefore, some arrangement should be made between the parties.

LORD PRESIDENT. I hold the Earl of Mar's statement to be not only an express warranty, but to contain an unfair representation. I think Lord Mar committed a fraud. I mean, that he did not act as he ought to have done in fairness, by referring to Dr. Wood. Under all the circumstances which had taken place, the fair answer of Lord Mar in reference to a medical man to ascertain his present and general health was, "I have no medical man in Edinburgh: for this reason, that for the last ten or fifteen years I have lived in England, and I only came to Scotland to attend my father's funeral, and have had no occasion for a medical attendant here; but last year I had occasion to consult Dr. Abercrombie; he attended me once or twice, and I refer either to him or to Dr. Wood, a medical man." In fairness, I repeat that he ought to have made this disclosure. Dr. Wood knew little more, or rather nothing more, about Lord Mar's health than Mr. Weir. It was a farce to refer to him as a medical man. In regard to the knowledge of Mr. Inglis as to his lordship's habits, that is done away with now altogether, by holding that he was bound to know what Lord Mar knew. Lord Mar was his agent, and so he is bound by his knowledge. I take the case of a ship for instance. The ship may be lost when I am making the insurance. This may be considered as a hardship, but it is cured in England by putting into the policy the words "lost or not lost." It is not so abroad, however. In most foreign countries no such words are in use, because they hold, that when both parties are necessarily ignorant, the insurer runs the risk. I insure a ship from Newfoundland to Lisbon. I receive intelligence that she was to sail on such a time. I insure her, and it turns out that she has been lost three weeks before. That is nothing to the purpose; the insurer must suffer the loss. On the other hand, it may happen that by a quick passage the ship has arrived before I effect the insurance. That makes no difference; the insurer retains the premium. In the same manner, if I were to insure the life of a person in India, — say that I have received a letter from a mutual friend, stating that he was in good health when he wrote. I insure that life accordingly. It may afterwards turn out that the man was dead before the insurance was effected; but that would be nothing to the purpose — the risk is run. In such a case as this, where the ignorance was positive, and without any blame in either of the parties, the

Strachan v. M'Dougle.

insurer runs the risk. So Lord Mansfield laid it down in *Ross v. Bradshaw*, 1 Bl. 312; but that is not the case here. Lord Mar is examined here—he makes these answers, and Mr. Inglis knew the answer. Under these circumstances, the bill of exceptions ought to be allowed; and in regard to a new trial, I suspect that the jury have paid very little attention to the evidence, in consequence of the direction that there had been a waiver or abandonment of the inquiry. It was a verdict given without evidence at all.

THE COURT accordingly “sustained this bill of exceptions, set aside the verdict, and granted a new trial, reserving consideration of the point of expenses till the final settlement of the cause.”

JOHN STRACHAN, claimant, vs. MISS JANE M'DOUGLE,
claimant.

(13 Court of Session Cases, 1st series, 954. 1835.)

Arrestment (garnishment). — An arrestment of the contents of a policy of life assurance, where the debtor died before any new premium fell due; *held*, competent and effectual.

Assignment (assignment). — An arrestment *held* preferable to an unintimated assignment of a policy of life assurance, although the policy had been delivered along with a letter of assignment to the assignee in England.

Question, whether an arrestment remains effectual after a new premium of insurance has been paid under a policy, and a new year has commenced.

IN 1825, the late Robert Strachan, W. S., effected a policy of insurance for £1,000 upon his life. The policy bore, that he had made payment of the premium “of £48 13s. 4d., being his first annual contribution to the stock and funds of the said society, together with £5 in name of entry money. Now these presents are to certify that, in consideration of the premises, the said Robert Strachan has been duly admitted a member of the society, and that his heirs, executors, and assignees shall be entitled to receive out of the stock and funds of the said society, at the end of six months after his decease, the sum of £1,000 sterling; but which sum shall not be exigible until three months at least after proof of the said decease shall be made to the satisfaction of a court of directors of the said society, or such other sums as shall become due on the contingency before expressed, agreeable to the laws and regulations of the said society; but always with and under this condition and provision, that the said Robert Strachan shall duly

Strachan v. M'Dougle.

pay, or cause to be paid, at the office of the said society in Edinburgh, the future yearly contribution of £48 13s. 4d., on or before the 13th May in every succeeding year during his lifetime, or within thirty days thereafter : And further providing and declaring, that in case the said Robert Strachan shall, within the time to which this certificate is limited, depart beyond the limits of Europe, &c., or in case payment of the said yearly contribution shall not be regularly made as aforesaid, then, and in every such case, this certificate shall be void, and all claim to any benefit out of, or interest in, the funds of the said society, in virtue of these presents, shall cease and determine."

In February, 1830, Strachan being indebted in £1,000 to Miss M'Dougle, residing in Berwick-upon-Tweed, addressed the following letter to her : "Madam, — I now send you herewith my promissory note of this date, for £1,000 to your order, payable at Whitsunday, 15th May next, and to bear interest from that date at five per cent., in return for which you will be so good as [to] return my former note for the same amount. I also herewith send you a policy of insurance of my life for £1,000 with the Scottish Life Insurance Office, the premium on which has been paid in advance up to 13th May next ; and which policy is to remain deposited with you, as a farther security, until my promissory note shall be paid. And I hereby engage not only to pay the premium as it becomes due, and to report to you the receipts for the same, but also, whenever required, to grant in your favor a regular conveyance of said policy ; but declaring that, in the mean time, in event of my death, you shall be entitled to recover the whole sums thereby due, so far as sufficient to pay my said promissory note and interest due thereon at the time." The policy was delivered to Miss M'Dougle at Berwick, and remained in her hands until the death of Strachan, which happened on 23d April, 1832. No assignation was executed in her favor, and it was only in June, after Strachan's death, that she made intimation of her right to the assurance office.

On the 13th of March preceding, Strachan granted his promissory note for £1,621 10s. at one day's date, in favor of his son John Strachan. It was said that this was for behoof of the family of the grantor, as true and lawful creditors to that amount. Letters of horning were raised on the note, and arrestments were used on the 5th of April, in the hands of the assurance office, of

all sums "due by them to Robert Strachan, or to any other person for his behoof, by bond, bill, &c., certificates or policies of insurance," &c. A competition arose, after Strachan's death, for the contents of the policy, and the assurance office raised a multiplepinding, and consigned the money in court.

The validity of Strachan's debt was challenged by Miss M'Dougle, but in disposing of the following question, it was, *hoc statu*, assumed to be a true debt.

It was pleaded by Miss M'Dougle, who produced the policy in support of her claim: 1st. That as nothing was due under the policy to Robert Strachan during his life, but the sum therein mentioned became due and exigible only after his death, and was payable only to his representative, it was incompetent for a creditor of Strachan to arrest it as due to him, or to any other person for his behoof. And though the terms of the policy gave him a share in the profits, it did not alter the nature of the obligation to pay the contents. 2d. That the claim was contingent and conditional, depending on the timely renewal of the contract by payment of the premium, — the non-violation of any of the conditions as to going beyond the limits of Europe, &c. Such a debt could not be made the subject of arrestment.

Strachan, besides disputing that the letter of the late Robert Strachan was equivalent to an assignation, pleaded, 1st. That, as the contents of a policy could be assigned, they must be subject to the diligence of arrestment; and as Mr. Strachan became of the company by the terms of the policy, its contents were as much arrestable as the share of a partner in any other company. 2d. That a debt, though contingent, might be attached by arrestment, and sums covered by marine policies frequently were so, although no intelligence of the loss of the ship might have arrived; and as Strachan died before any new premium fell due after the arrestment, *dies cesserat*, at the date when the arrestments were used.

The lord ordinary reported the cause on cases.¹

¹ The lord ordinary is inclined to think that the claim of John Strachan is well founded, for the reasons assigned in his case. The sum contained in the policy of insurance, though not payable to Robert Strachan himself, but to his heirs and assignees after his death, was constituted by an obligation in his favor, and it was placed at his absolute disposal. Though a contingent debt, it was not the less liable on that account to be attached by arrestment. In

Strachan v. M'Dougle.

When the case was first put out for advising, the lord president observed that no plea had been raised as to the effect of the deposition of the policy in the hands of Miss M'Dougle, the right of retention or pledge which might thus arise to her, and the circumstance that the office would not pay until the policy was produced, which she also could do.

The court ordered supplementary cases upon this point. Miss M'Dougle pleaded, 1st. That the necessity of intimation for completing an assignation had no other foundation than custom, and the reason of it was, that until the debtor should be put on his guard against paying to the cedent, the assignee's right was only inchoate. But as policies of life insurance were of comparatively recent introduction, and, in some measure, belonged to mercantile law, it was unnecessary that there should be intimation at assigning them. The assurance office never paid till the policy was produced, and therefore the reason for intimation to put a debtor on his guard had no application. In England, accordingly, in this and many similar instances, a right was effectually transferred, or a pledge effectually created by mere deposit of the deeds constituting the right.

2d. There were many documents which, on being pledged, conferred a real right on the pledgor, not defeasible by any diligence or voluntary assignment. Such, for example, were bills of exchange ; and, in like manner, a bill of lading,¹ by mere delivery, effectually transferred the right to the cargo of the ship at sea.

consequence of the payment of the premium for one year, *dies cesserat*, that is, the sum assured had become payable if the life dropped within that year.

At the same time, as the point raised does not appear to have received the judgment of the court, and a life insurance has of late become a very common, as well as an important contract, the lord ordinary has thought it right to report the case.

There seems no room for the objection urged against the arrester's claim, as not sufficiently vouched against Robert Strachan ; and it is of no importance in this action that Robert Strachan died insolvent, because the promissory note has not been brought under reduction on the act 1621, or any other ground. The conduct of Robert Strachan was by no means free from blame ; but it does not appear that John Strachan, or any of the children for whose behoof he claims, was implicated in the fault, or responsible for it, as representing their father. On the other hand, there was great negligence on the part of the claimant, Miss M'Dougle, in not intimating her assignation. — REPORTER.

¹ 1 Bell, 198.

The delivery of a policy of insurance should be attended with equal effects.

3. There was no power of compelling her to give up the policy, and payment could not otherwise be recovered. This right in her was not impaired by the circumstance of a multiplepounding being raised, and the policy produced with her claim, as that could not alter the rights of parties.

Strachan answered: 1. That it was a fundamental principle of the law of Scotland, that intimation was essential to complete any assignation. If this was founded only on custom, it still had the same foundation with a very large part of the law, which could not now be questioned. Policies of life assurance did not belong to the law mercantile, but both as to their original constitution and effectual transference must be governed by the municipal law of the state where the contract was made and transferred. The English decisions supporting the doctrine of equitable mortgage upon the deposit of deeds had been highly injurious to their law, and the subject of much regret.¹

2. There was a necessity for giving extraordinary privileges to bills of exchange and other negotiable documents; but there was no necessity for extending such privileges to policies of insurance, and it would be contrary, both to principle and expediency, to do so.

3. There was no need for the claimant to possess the policy, or to give it up to the assurance office. As a multiplepounding had been brought, the policy produced in court, and its contents consigned, the office would be sufficiently discharged by decree of exoneration in this action, in favor of any party preferred by the court; and as any other debt might be effectually arrested and made forthcoming, even though the bond by which it was constituted was not in the possession of the arrester, so might the contents of a policy of assurance.

LORD PRESIDENT. When the case was last before the court, we were unanimously of opinion that if the right of Miss M'Dougla rested only on an assignation to the policy, it was ineffectual without intimation, as it was brought into competition with a party who is, *hoc statu*, assumed to be a true creditor, and

¹ *Whitbread, ex parte*, 1 Rose, 299; *Mountfort, ex parte*, 14 Vesey, 606; *Coombe, ex parte*, 17 Vesey, 370; 2 Bell, 23.

who has used arrestments. But we were desirous of seeing farther argument on the effect of the actual deposition and delivery of the policy which had been made in the hands of the creditor for her security. I consider that to be a question which is not free from difficulty. I do not perceive that any party has a right to compel Miss M'Dougles to part with the policy except on payment of its contents ; and if the office cannot be compelled to pay without delivering up the policy to them, it does not appear clear how far her rights can be defeated by the measures which have been taken in this case. For I do not think the rights of parties can be altered by the mere circumstances that a process of multiplepoinding is the form of action in which these rights now require to be extricated, and that Miss M'Dougles has produced that policy in process in support of her claim. It is to be considered as a document in her hands at this moment to the effect of preserving entire any right of retention which would have been competent to her had the document not been produced.

LORD BALGRAY. I think the decision of this case is not to be arrived at without experiencing some embarrassment. I attach no weight to the plea that the contents of the policy were not arrestable, because they were payable only to the heirs or assignees of the assured, and not to himself. He could have assigned the contents of the policy, and I think them equally liable to be attached by arrestment. Then, it appears that no new premium of assurance fell due after the date when the arrestments were used. The death occurred during the current term, which was then covered by the premium previously paid. Holding the arrestment then to be an effectual diligence, I conceive that, according to the principles of the law of Scotland, the right of Strachan is clearly preferable to that of Miss M'Dougles.

The letter of the late Robert Strachan to her, and the delivery of the policy, I have no hesitation in considering to be equal to an assignation ; but it was never intimated, and nothing can be clearer in our law than that an unintimated assignation is ineffectual in competition with an arrestment. But I have some doubt whether the case should be decided with reference solely to the law of Scotland. Policies of insurance are a new species of instrument, which are of recent introduction in England, and are still more recent here. But they are highly useful and beneficial. They have become important from the extent to which

the business of insurance is carried on, and this is every day increasing; and I think the court ought to view them favorably, and give every facility consistent with law to their transference between debtor and creditor. I am doubtful, therefore, whether a question of this kind should not be viewed as belonging to the law mercantile, and whether we ought not to see more of the English practice and decisions in such cases before we determine in this cause. In general, the assurance office, I understand, holds the *jus exigendi* to be inseparable from the custody of the policy, and will refuse to make payment until it is produced and delivered to them. Miss M'Dougle acquired a legal right to the custody of it under the letter of the late Robert Strachan, and she is now the actual custodier of the instrument. I am very unwilling to give any extension to the doctrine which holds obligatory deeds to be transferred and effectually pledged by mere delivery, but I think it would be proper to see more of the law and practice of England before deciding.

Lord GILLIES. I do not feel the same difficulties with your lordship and Lord Balgray. An arrestment is preferable to an unintimated assignation. But I do not see how anything more can be made of the right in favor of Miss M'Dougle than to account it equivalent to an assignation. Even had the policy been indorsed to her, still if an assignation was subsequently executed in favor of another party, and that was first intimated to the assurance office, I am at a loss to see how they could afterwards pay the contents to the indorsee producing the policy. The analogy of a bill of exchange which passes by indorsation is a very dangerous one, because bills necessarily possess extraordinary privileges. But these are not to be rashly extended to documents of a different nature. I think the right of the arrester is preferable; and, in coming to this conclusion, I am not at all influenced by the circumstance that the question arises in a multiplepinding, where the contents of the policy have been consigned, and the policy has been produced by one of the claimants. But giving to her every benefit which she can legally claim as the custodier of the policy, I think the arresting creditor has a preferable right to the sum assured on the life of his debtor.

Lord MACKENZIE. I concur in much of what has been stated by Lord Gillies. There are some questions of importance raised by the parties in this case, and there is one of some difficulty on

which I wish to reserve my opinion, as it is a point not necessary for the extrication of the case. I mean the question, whether an arrestment used during one year would be effectual to attach the contents of the policy not only for the year which is actually current when the arrestment is used, but also for subsequent years, and after other premiums have been paid to keep up the policy? An arrestment is quite good though the day of payment has not come, if the term be current; but if it is only after a new term has begun, and a new payment of premium has been made, that the contents of the policy ultimately become exigible, the question is very different whether these contents have been effectually attached by arrestments used during a preceding year. On that point I offer no opinion, for in this case the assured party died before any new premium fell due, and I have no doubt that an arrestment was an apt diligence to attack the contents of the policy which became exigible on his death.

The question then remains, whether the right of the arrester was excluded by the prior right of the assignee? I think there is in substance a good assignation in her favor, but it was not intimated, and by the law of Scotland an unintimated assignation cannot compete with an arrestment. To obviate this, it is pleaded that the delivery of the policy completes the assignee's right without intimation. This is a doctrine of a dangerous tendency. It is an important general principle of our law, and there is none more vital, that the delivery of the *corpus* of a deed or instrument will not carry the real right that is contained within such deed or instrument. But then it is said that, from the origin and nature of policies of insurance, the law of Scotland is excluded by what is called the law mercantile; and if any serious doubt is to be raised upon this, I should wish to know what are the precise averments made by the assignee as to the law and practice of England and of Europe. I am a little at a loss to know what she states it actually to be. Is it that a policy will pass from hand to hand like a bill of exchange, by a blank indorsation? Or is it that it does not even require an indorsation, but is transferable like a bank note, which is payable to the bearer? If it be only the former which is averred, it will not avail the assignee, for there was no indorsation in this case, and it would only injure her rights to plead that an indorsation would have availed her, seeing that she has got none; and I can scarcely believe that the latter

avermment is seriously made, viz., that a policy of insurance, which may be for a great sum, and generally is for a considerable amount, should circulate from hand to hand like a bank note to be payable to the bearer, so that whoever presented it at the office, and he alone, should be entitled to uplift its contents, and discharge the office of their obligation.

If such an averment as this should now be seriously made, I should still hesitate whether to give time for inquiry, or whether we ought not at once to decide in conformity with our own laws. But I should at all events require a specific averment on the subject, and I think it highly improbable that any such law or practice should anywhere prevail ; for whatever expediency, or rather necessity, there may be for according to bills and notes the extraordinary privileges which they possess, I cannot perceive any reason for extending these to policies of assurance. I am not at all influenced by the plea of Strachan, that the question arises under a multiplepinding in which the contents of the policy have been consigned, and the policy itself produced by a claimant. All that would not alter the rights of the parties. But, independently of that, I think the arresting creditor is to be preferred.

Robertson, for Miss M'Dougle, brought under the notice of the court that Miss M'Dougle resided in Berwick, and the policy had been sent and delivered to her there. The legal effect of such deposit ought, therefore, to be governed by the law of England.

Lord GILLIES intimated that he thought the law of Scotland must rule this case, and the other judges concurred.

THE COURT found, " That the arrestment at the instance of the claimant, John Strachan, was a competent diligence to affect the sum due under the policy of insurance in question, and that the same is preferable to the right contended to be conferred on the claimant, Miss M'Dougle, by the letter of February 20, 1830, accompanied by delivery and possession of the policy of insurance, and remit to the lord ordinary to proceed," &c.

MARK SPROTT *et al.*, trustees for the Scottish Amicable Life Assurance Society, pursuers; MRS. CHRISTIAN ROSS *et al.*, Paton's trustees, defenders.

(16 Court of Session Cases, 1st series, 1145. 1838.)

Concealment. Post mortem.—In a reduction by an insurance office of a policy of life insurance on the grounds of concealment or non-statement of important facts and of untrue averments as to the health of the party insured, with the fraudulent intention of misleading the pursuers, issue allowed “whether by misrepresentation or undue concealment, or non-statement of material facts as to the health, &c., the pursuers were induced to grant the policy;” although the defenders contended that the term “wilful” ought to be inserted in the issue, in order to obviate a possible case of non-statement of facts insured being proved, the existence of which might only be discovered *post mortem*: *Held*, that a pursuer is not bound to take an issue exhausting his whole averments on the record as to fraud, &c., but it is sufficient if the issue be within the record, and relevant to support the conclusion of the action.

In April, 1834, the late Mrs. Catherine Paton effected with the Scottish Amicable Life Assurance Society an insurance of £500 on her life, upon the usual declaration “that the party insured is at present in a good state of health, and not afflicted with any of the aforesaid diseases, or any other disease which tends to shorten life; and that it is hereby agreed that if any untrue averment is contained in the above statement, all claim to any benefit out of, or interest in, the funds of the said society, in virtue of any policy that may be issued in relation hereto, shall be barred and excluded,” &c. Mrs. Paton having died in November, 1835, and her trustees claiming under the policy, the Assurance Company brought an action against the trustees concluding for reduction of the policy. The grounds of action were thus set forth in the pursuers’ revised condescendence: “The declaration and proposal (for effecting the insurance) so lodged by the said Mrs. Catherine Munro or Paton with the officers of the said society, and declarations or answers so emitted by her to the said George Wylie, (medical adviser of the assurance company,) as also the said reports (as to the health of the insured) by the said James Stevenson and Helen Munn or Kennedy, concealed or did not state important facts, and contained averments, and were known to the said Mrs. Catherine Munro or Paton to conceal or not to state facts, and to contain untrue averments in regard to the state of her health, at the time of granting thereof, and previous thereto; and also in regard to her habits being moderate and

temperate, or otherwise, and were of a nature tending to mislead, and did mislead, and were fraudulently intended to mislead the pursuers, as to the true state of health and habits of the said Mrs. Catherine Munro or Paton, who, in point of fact, was not then in a good state of health, but was of a feeble and worn-out constitution, subject to fits, and her liver diseased, and had been under medical treatment and attendance, and was not regular and temperate in her habits and mode of living; but, on the contrary, was irregular and intemperate to a very great and excessive degree, and in the use of indulging in intoxicating liquors, — all which was concealed or not stated, or was misrepresented and untruly stated to the pursuers; and if the same had been fully and truly stated to them, they would not have entered into the transaction.”

With reference to the grounds of reduction, the pursuers’ plea in law was as follows: “The policy of assurance in question having been obtained and issued in consequence of misstatement or false representations, or in consequence of concealment or non-statement as to matters regarding the health and habits of the late Catherine Munro or Paton, which it was material for the pursuers to know and to be informed of truly, the policy is not valid or binding on the pursuers, and is liable to be reduced.”

The following issue for trying the question was proposed by the jury clerks: “Whether by false statement, or undue concealment or non-statement as to the health or habits of the late Mrs. Catherine Munro or Paton, the pursuers were induced to grant the policy of insurance No. 12 of process, dated 18th April, 1834?”

To this issue it was objected by the defenders: —

1st, That it was not calculated to try the case as stated on the record, which was not a case of innocent error or mistake on the part of the insured as to the state of her health at the date of the policy, but a case of wilful and fraudulent misrepresentation and concealment, with a view to mislead the pursuers; and that the defenders were entitled to insist that the issue should be framed in such a manner as to embrace the case as stated, and not a case which, whether relevant or not, was not raised upon the record.

2dly, That the issue was imperfect, in so far as its affirmative, if found by the jury, might comprehend the case of an erroneous statement by the party insured, only discovered to be erroneous

by her being found *post mortem* to have labored under a latent disease, of the existence of which she was ignorant at the date of the insurance; that there was no authority for holding that the law made it a condition of a policy being binding, that no material fact should exist, whether known to the parties or not, which had not been communicated; that, even in the case of express warranties of health, the law attaches no such unreasonable condition to them;¹ and it was evident that such a state of the law would render the negotiation of an absolutely secure life insurance impossible, as there would always be the risk of something emerging of which the parties could not at the time be aware, and against which risk no calculation could be made or immunity purchased; it was requisite, therefore, that the issue should be qualified by the addition of the term "wilful," or some such adjunct, to make the species of false statement, or non-statement, which ought to be proved in order to avoid the policy.

It was answered by the pursuers:—

1st. That although the pursuers were bound to take an issue relevant to support the conclusion of their action, and were not entitled to take it upon matter not set forth on the record, it could not be maintained that, if the record contained a superfluity of averment, they were bound to undertake a proof of the whole of it; that they were not bound to undertake to prove them enough to make out their case; that it was the pursuers who took the issue, and provided they took an issue within the record, and sufficient in relevancy to support the conclusion, the defenders were not entitled to interfere;² and, in the present case, the issue was completely within the record and the pursuers' plea in law.

2dly. That, in other respects, the issue was proper for the trial of the case and according to received practice; the hypothetical cases were not to be anticipated; and, with reference to the issue, the proposition in law maintained by the pursuers was, that if there be facts really existing, material to be communicated, tending to influence the insurance, or to lead to inquiry which might tend to influence the insurance, the non-communication of such material facts, whether fraudulent or not, whether there had been

¹ *Ross v. Bradshaw*, 1 W. Blackstone, 312; *Willis v. Poole*, 2 Park, 650; *Watson v. Mainwaring*, May 6, 1813, 4 Taunton, 763.

² *Borthwick v. Ralston's Trustees*, July 21, 1837, (15 Ct. Sess. Cas. 1st series, 1306.)

 United Kingdom Life Assurance Company v. Dixon.

any active concealment of them or not, and even although there may have been no false statement at all, will afford a sufficient ground for voiding the policy.

The lord ordinary reported the matter to the court on minutes of debate, adding to his interlocutor the subject note.

After some discussion,

THE COURT approved of the issue on its being verbally altered as follows:¹ "Whether, by misrepresentation or undue concealment or non-statement of material facts, as to the health or habits of the late Mrs. Catherine Munro or Paton, the pursuers were induced to grant the policy of insurance, No. 12 of process, dated 18th April, 1834?"

Cunningham & Walker, W. S., Dundas & Jamieson, W. S., agents.

UNITED KINGDOM LIFE ASSURANCE CO., raisers; ROBERT DIXON and CHARLES HAY, claimants; MRS. MARY LOTHIAN or ALLAN, claimant.

(16 Court of Session Cases, 1st series, 1277. 1838.)

Delivery. Title.—A right to the contents of a policy of life insurance is not passed by mere delivery of the *corpus* of the policy; and therefore *held*, that a creditor of the party assured, after the death of the assured, should be postponed, though in right of the custodian of the policy, to the executor, *qua relict*, confirming the contents of the policy as *in bonis* of the defunct.

Circumstances in which this rule was applied.

IN June, 1836, James Allan, slater, in Edinburgh, obtained a cash account for £500 with the Royal Bank, and granted bond

¹ With reference to the defenders' argument on the issue, Lord Justice Clark observed: "If the pursuers mean to say that the non-statement of facts as to the health of the insured, which may appear, on a *post mortem* examination, to have affected the duration of the party's life, is to be held to endanger a policy, no policy in Great Britain would be secure, and such doctrine is untenable. *Office v. Ralston*, tried before the lord president in July, 1837. In the latter case the question put only comprehended misrepresentation and concealment, whereas in the present case it is further asked if there was a non-statement as to the health and habits of the insured. But possibly the latter inquiry was not asked in *Ralston's case*, or might not arise on the record. Looking, however, to the doctrine laid down by Lord Lyndhurst in *Duckett's case*, wherein his lordship laid very particular emphasis on the non-communication of a material fact, the lord ordinary thinks that this question (when desired) ought in general to be put to juries in questions of this nature."

to the bank along with Robert Dixon, grocer, Charles Hay, plumber, and John Lunn, builder, all in Edinburgh. These parties were co-obligants as to the bank, but were cautioners in a question with Allan. On applying for the cash credit, Allan, besides proposing the security of these parties, and a security over certain heritable subjects, offered to assign to the bank a policy of insurance for £499 19s. 6d., which he had effected on his life in July, 1835, with the United Kingdom Life Assurance Company. When the bond was executed, Allan placed the policy in the hands of the bank, but the bank were satisfied with the security of the co-obligants, and did not require any assignation to the policy, but merely retained it in their custody. Allan died in July, 1836, at which time the sum of £325, besides certain interest, was due at the bank. In October, 1836, Mrs. Allan, the widow, was confirmed executrix *qua relict*, for behoof of her husband's creditors, and she called on the bank to deliver up the life policy, which she had specially included in the inventory. In February, 1837, a multiplepoinding was raised in name of the United Kingdom Life Assurance Company, in which a decree was pronounced against the bank, in whose hands the policy still was, ordaining them to exhibit it, "reserving to them, and all concerned, their rights in virtue of the policy." The bank produced the policy in process, but under the express reservation of their own rights, and the rights of the co-obligants under the bond; and they stated in a minute, that when Allan placed the policy in their hands, he stated "that he was afterwards to execute an assignment of it in favor of his co-obligants in the bond for their security and relief; and the secretary of the bank accordingly indorsed on the back of the policy the following marking in pencil: 'Policy to be assigned by Mr. Allan to his Co-o.' Mr. Allan died soon after, and matters were in this state at his death." Subsequently to this Dixon and Hay paid up the amount due under the bond to the bank, and obtained an assignation to the bond, and also to "any right or claim competent to the said bank in or to the said certificate or policy of insurance, and sums of money thereby due." But it was decided that there was no warrantice of "any right or title on the part of the said bank to the said certificate or policy of insurance, or sums of money thereby due."

Dixon and Hay now claimed the contents of the policy, as

being in the full right of the bank, and therefore entitled to retain the policy until relieved of their whole advances under the bond to the bank. Mrs. Allan, the executrix, pleaded that a policy of insurance did not circulate from hand to hand, by mere delivery; that the bank acquired no right to it or its contents by becoming custodiers of the *corpus* of the policy, and therefore that they had transmitted no right to Dixon and Hay, their assignees. The policy and its contents had been simply *in bonis* of the defunct until confirmed by her, and she alone could uplift and discharge the policy, and should therefore be preferred in this competition; she being subject, of course, to account for its contents to the creditors of her husband.

The lord ordinary “preferred the claim of the claimant, Mrs. Allan, to the fund *in medio*, and decerned and found her entitled to expenses.”¹

¹ “When the late Mr. Allan applied to the bank for a credit, he offered the security of certain cautioners, — of certain house property, — and of a life policy of insurance. Nothing was done under this offer in reference to the houses; and though the policy was delivered to the bank at the time of granting the bond for the credit, it was not assigned; and the secretary states, in his letter of 11th August, 1836, that the bank did not desire any assignation, as they were perfectly satisfied with the co-obligants proposed by Mr. Allan for his cash account. In point of fact, however, the policy remained in the hands of the bank.

“Mr. Allan died in a few weeks, in debt to the bank under the credit. The cautioners paid the debt, and have got an assignation from the bank to this policy, which, however, warrants nothing, and merely conveys any right that the bank had. The cautioners, both in virtue of their own right, independently of this assignation, and under it, claim to be preferred to the policy. They are opposed by Allan’s widow, who maintains that it belongs to her as executrix, and must be accounted for to the creditors generally.

“The lord ordinary has preferred the claim of the widow, and upon the simple ground that a policy is not a thing that passes like a bill from hand to hand, and that an assignation or some other form of conveyance was necessary to take this *ex bonis* of Allan, and make it the bank’s. He conceives this question to be, *a fortiori*, settled by the case of *Strachan*,¹ 19th June, 1835, where a policy really was assigned as a security; but even this was found to be ineffectual, because the assignation had not been intimated. No doubt, it was only found ineffectual as against an arrestment. But there is no arrestment here, and the doctrine of that case was, that the mere deposition of the policy operated no transference.

“The cautioners say that it was understood and agreed that the policy

¹ *Ante*, p. 412.

Dixon & Hay reclaimed.

LORD MACKENZIE. This is a multiplepounding raised by the assurance company, as to the contents of the policy, and the question is, which of the competitors has the preferable claim. I think that the reclaimers have no title whatever. So important a right as that of a policy of life assurance is not effectually transmitted from one party to another, by merely passing the *corpus* of the policy from one hand to another, without any assignation or intimation being executed. The case of *Strachan*¹ is a decision expressly to that effect. But the bank never obtained an assignation in their favor; they merely obtained the custody of the *corpus* of the policy. Their assignees hold no higher right than the bank did; and I consider that they have no right to interfere with the other claimant who has made up a title, *ex facie* regular and complete, by expeding a confirmation as executory *qua relict* in which she has specially included the policy in question.

LORD COREHOUSE. An executrix *qua relict* has just as good a title to intromit, as an executrix *qua* next of kin would have. Her title as set forth on the record is quite sufficient. If she misapplies the funds uplifted by her, an action against her will lie. But, in the mean time, the question in this competition lies just where the lord ordinary has put it. The reclaimers have no title whatever. Their authors, the bank, never had an assignation in their own favor, but were the mere custodiers of the *corpus* of the policy. As the bank had no valid conveyance to the policy, the reclaimers, their assignees, have none. The only habile title is in the relict, under her confirmation, and she ought accordingly to be preferred.

LORD PRESIDENT. I am of the same opinion.

THE COURT adhered, and awarded additional expenses against the reclaimers.

should be lodged with the bank for their behoof. But they offer no proof of this beyond what is already in process; and it appears to the lord ordinary. 1st, That there is no sufficient evidence of the averment, which depends chiefly on a few words written on the back of the policy in pencil, which are unsigned, but are not alleged to have been written by Allan. 2d. That even though there had been such an arrangement, as nothing was done during Allan's life to carry it into effect, but it rested upon a mere understanding, this cannot give any preference to the cautioners over the other creditors."

¹ Ante, p. 412.

MARQUESS OF QUEENSBERRY *et al.*, trustees and executors
of the late Marquess of Queensberry, pursuers; SCOTTISH
UNION INSURANCE Co., defenders.

(1 Court of Session Cases, 2d series, 1203. 1839.)

Assignment. Annuity. Presumed intent. — An insurance company made an advance of £29,980 to A, who granted in their favor a heritable annuity over his entailed estate, and assigned to them certain policies on his life, reserving power to redeem the annuity, and thereon to obtain a reconveyance of the policies held by the company at the date of redemption; the policies assigned had been in force for several years, and several of them entitled the holder to participate in the profits of the offices which granted the policies. A died without redeeming the annuity; the company recovered out of the proceeds of the policies their whole advance, and an additional sum of £1,118, which had accrued by way of *bonus* on the participating policies. *Held*, by a majority of the court, in reference to the whole terms and circumstances of the transaction, that, although the assignation of the policies to the company was, *ex facie*, out and out, yet, according to the true and manifest intent of parties, the object of it merely was to reproduce to the company the sum of £29,980; that the absolute terms of the assignation might be restrained, under the equitable powers of the court, within the limits of the true and manifest intent of parties; and that any surplus recovered by the company beyond £29,980, belonged to the executors of A.

IN 1817, the late Marquess of Queensberry executed a trust disposition of his whole estate in favor of Charles Selkirk, accountant in Edinburgh. In 1819, 1822, and 1826, various policies of insurance were effected by Selkirk on the life of the Marquess, to the amount in all of £26,000. In some of the insurance offices the policies entitled the party insured to a certain participation in the profits of the office. In 1829, the Marquess resolved on placing his estates under a new trust management, and in February of that year, William Stewart, W. S., his agent, addressed to the Scottish Union Insurance Company a proposal, entitled, "Proposal for a loan of £30,000 or £26,000, upon redeemable annuity, for the Marquess of Queensberry." This contained a statement of the affairs of the Marquess, including a notice *inter alia* that he had already "granted annuities" amounting to £3,798, partly secured on heritage, partly by personal bond merely. It then mentioned that, in order to arrange his affairs, there was likewise the sum of £30,000, now to be borrowed for paying off the postponed debts." In reference to this sum, it was stated, "his lordship now offers to grant an heritable bond of annuity over the barony of Kinmount, in security of the premium and interest on the sum of £30,000, now to be borrowed.

 Queensberry v. Scottish Union Insurance Company.

“ The rental of this barony is . . . £4,388 10s. 2½d.

“ And the estimated product of the man-
sion house, grass parks, and woods . . . 700 00 00

“ Making together £5,088 10 2½

“ The certified rental is sent herewith. The existing policies of insurance which were effected some years ago amount to £26,000 ; the annual premium of which is £1,100. These policies will be assigned in security of the loan, if it amounts to £26,000 ; and if to £30,000, additional insurances to the value of £4,000, will be effected with the Scottish Union Co. Any fire insurance under Lord Queensberry’s control will also be effected with this company. If £26,000 only shall be given in one sum, it will be understood that the remaining £4,000 will rank *pari passu* with it.” The proposal mentioned that William Paul, accountant in Edinburgh, one of the trustees about to be appointed by his lordship, would bind himself to “ apply the rents of the estate in terms of the different securities ; ” and it was then added : “ Lord Queensberry has been informed that one of the first insurance companies in London has come to the resolution of appropriating a large sum to be lent on heritable security in Scotland ; and that they are to give money on annuity at five, and by way of ordinary loan on good landed security at three and a half per cent. Lord Queensberry is desirous to know at what rate the Scottish Union Insurance Company will transact with him.”

The agents of the Scottish Union Insurance Company answered that the company “ have agreed to advance the Marquess of Queensberry £30,000 on annuity, on the security of the barony of Kinmount, as stated in your last proposal. The rate will be six per cent., which is the lowest at which any transactions of this nature have been entered into for some time past ; and in addition to the security afforded by the lands, it will be necessary that Mr. Paul grant an obligation for the regular payment of the annuity while he continues trustee for Lord Queensberry.” The company’s answer further stated : “ It will also be necessary that, in the event of a committee of the principal heritable creditors being appointed to advise with the trustee, that one on behalf of the Scottish Union be included in this number.”

Stewart answered that Lord Queensberry accepted the proposal, and “ should his lordship hereafter find that the money can be

Queensberry v. Scottish Union Insurance Company.

obtained at a lower rate than six per cent., he trusts that the company will give a corresponding abatement, and save him the expense of an assignation to the bond."

The estates of Lord Queensberry were then conveyed from Sellrig to John Douglas, of Lockerbie, Esq., brother of his lordship, and William Paul, accountant in Edinburgh, or either of them, as trustees. Paul took the active management of the trust; and the policies of insurance for £26,000 having been conveyed to him, he, in November, 1829, with concurrence of Lord Queensberry, executed an assignation of them in favor of the Scottish Union Insurance Company. The deed narrated that the company "have instantly made payment to me of the sum of one pound sterling, for, and as the consideration of my granting the assignation underwritten: Therefore I, the said William Paul, as acting trustee aforesaid, with the consent of the said Charles Marquess of Queensberry, and I the said Charles Marquess of Queensberry, for all right and interest I have in and to the policies of insurance above mentioned, do, by these presents, fully and absolutely assign, convey, and make over to and in favor of the said Frances Howden, &c., (trustees for the company,) as well the said certificates or policies of insurance themselves, as all right and interest which I, as acting trustee aforesaid, have in and to the same, or in or to any claim, advantage, or benefit which may arise thereby, in any manner of way, with full power to the said trustees before named, and their foresaids, to receive the whole sums which may become due by or under the said certificates or policies of insurance, and to discharge and convey the same in the same manner, and as fully and freely in all respects, as I could have done before granting hereof: Which assignation I, as acting trustee, and with consent foresaid, bind and oblige myself and my foresaids to warrant to all concerned, from all facts and deeds done or to be done by me in prejudice hereof." The deed further bore that these policies were delivered up to the company "to be used by them as their own proper writs and evidents." In the introductory part of this deed, where the policies were severally recited, those which were granted by the equitable offices set forth that the respective offices bound themselves to pay the sum in the policy, "and such further sum or sums as shall, under the regulations of the said company, be appropriated as a bonus, or addition to this policy."

When Stewart revised this assignation and sent it to the agent of the company, he wrote a note, saying, "There is a condition which must be expressed either in it or the bond of annuity, *i. e.*, that the Scottish Union shall be bound to reconvey the policies in the event of the annuity being redeemed. This of course is fair and reasonable, and consistent with our understanding." In June, 1830, the agent of the company wrote to Paul, declaring, for the company, that, according to the understanding and stipulation at "entering into the annuity transaction," the company were bound, on redemption of the annuity, "to assign the policies of insurance held by them at the date of redemption of the annuity."

Besides the policies already mentioned, another policy to the amount of £3,000 had been effected on Lord Queensberry's life by Robert Thrashie, his lordship's factor. This was also assigned on the same terms to the insurance company. The insurance company further effected an insurance on his lordship's life, to the amount of £1,000, with the Palladium Insurance Office.

In January, 1830, a heritable annuity was granted over the barony of Kinmount to the insurance company. It was at this time that the full advance of the £30,000 (or more strictly speaking £29,980) by the company was completed. The deed of annuity narrated that the company "have instantly advanced and paid to me the said William Paul, as trustee foresaid for the said marquess, and for the special purposes of the said trust, the principal sum of £29,980 sterling;" therefore the marquess bound himself, and his trustee bound himself as trustee, to make payment to the company "of a free yearly annuity or clear yearly sum of £3,090 sterling, for and during all the days of the natural life of me the said marquess, and while the said annuity shall remain unredeemed." The payment was to be made at two terms in the year, and it was stipulated that payment should be made "of a proportional part of the said annuity or yearly sum from the term of the last half-yearly payment till the day of the death of me the said marquess." It was also stipulated that Lord Queensberry should not go abroad, &c., or enter the army, &c., "so long as the said annuity shall continue payable," without giving one month's notice to the company; and, in case the company "shall have previously insured or shall insure any sum or sums of money, not exceeding £29,980 sterling, on the life of me the said marquess, or shall have acquired right to any policies

of insurance on my life not exceeding said amount, and shall pay any additional premium or premiums of insurance, on account of my going on the seas," &c., then Lord Queensberry and his trustee bound themselves to pay such additional premiums to the company; and this was equally to be done though the company should stand their own insurers as to this extra risk. It was also provided, that if, through any act of Lord Queensberry, the insurance effected or to be effected on his life by the company, or the policies to which they acquired right, should be annulled or prejudiced, then Lord Queensberry and his trustee bound themselves respectively, as aforesaid, to pay all damages sustained by the company. In security of the payment of the annuity, an obligation was granted to infest the company in the barony of Kinmount, "under this provision and declaration, as it is hereby expressly provided and declared, that the said annuity, or clear yearly sum of £3,090 sterling, and the lands and others out of which the same is payable, are and shall be redeemable and subject to repurchase from the said trustees or their foresaids, by me the said marquess, and me the said William Paul, as trustee aforesaid, or those in our right, at the term of Candlemas, 1831, or at any term of Candlemas thereafter, (upon lawful premonition of sixty days at least, previous to the said term of Candlemas, at which the same is to be redeemed,) by making payment to the said trustees or their foresaids of the said principal sum of £29,980 sterling, and whole arrears of the said annuity, which shall be due and owing at the time, and interest thereof," with all necessary costs, &c. On making "such payment and redemption" the party in right of the annuity for the time was to be bound to reconvey the annuity, "together with the security for the same."

On May 15th, 1832, Paul wrote to the insurance company that he had "an offer of a loan," at $5\frac{1}{2}$ per cent., on a transfer of the security, and an assignation of the policies, and requesting "a reduction of the rate of annuity to that extent," as it would otherwise be necessary to incur the expense of "the changing of the creditor." The company, in answer, agreed to "make an abatement of one half per cent. on the rate of annuity," provided that the rate of interest in the money market should be such that certain banks specified were discounting at four per cent. at the period of sixty days before Candlemas, the date when the annuity was redeemable.

In November, 1835, Paul applied to the company "to reduce the annuity" to the rate of five per cent., stating that this was the usual rate at which investments on redeemable annuities could be got, and that he could be accommodated with £30,000 at this rate, "on a transfer of the bond and securities which you hold." In December, 1835, the company agreed "to accept of five per cent. interest upon the annuity," &c. In November, 1836, the rate of interest having risen, the company intimated that "the rate of annuity" payable by Lord Queensberry was to be charged "at the rate of $5\frac{1}{2}$ per cent., (after Candlemas,) clear of insurance premiums." To this advance Paul assented.

Lord Queensberry died in December, 1837, without having exercised the right of redemption. Under the policies, some of which were payable within three months, and others within six months after proof of the death, the Scottish Union Insurance Company obtained payment of the sum of £31,118. To the amount of £1,118 this consisted of a participation, by way of bonus, in the profits of these equitable offices, from whom participating policies had been obtained.

The trustees and executors of the marquess applied to the company for payment of the surplus sum received by them above £29,980, alleging that the transaction of the late marquess with the company was truly a loan of £29,980 to him, and nothing else; and that the surplus formed part of the estate of the marquess. They offered to make good any loss of interest which might be occasioned to the company in consequence of the sums in the respective policies not being payable for three months, or for six months after proof of the death of the marquess. The company, on the other hand, maintained that they did not effect a mere loan to the marquess, but bought out and out, and were entitled to the full proceeds of the subjects sold and conveyed to them. Lord Queensberry's trustees and executors raised an action to enforce their claim, and pleaded that the nature of the transaction was essentially a loan of £29,980 on certain security. As Lord Queensberry's estates were entailed, he could not give security over the fee of them, and therefore he was obliged to give security in another form, by conveying to them a heritable annuity of sufficient amount to pay not only a certain percentage on the sum advanced, but also the annual premium on life policies for an amount equal to that sum. But the sole purpose of

Queensberry v. Scottish Union Insurance Company.

conveying the policies was merely to secure the £29,980. Accordingly, it was specially stipulated that if the marquess should ever redeem the annuity, the insurance company were bound to reconvey to him the policies. In these circumstances it was not optional to the company to have dropped the policies if they pleased; they got a right to them only to the extent of securing their advance; and as soon as that advance was satisfied, their whole right in the policies was evacuated. They were therefore liable to account to the pursuers for the free surplus claimed.

The company pleaded that they had not effected a mere loan of £29,980, but the purchase of an annuity of £30,000. If no policy had been previously effected on the life of Lord Queensberry, they could not have given so large a price for the annuity, because, whether they were to effect a new policy, or to stand their own insurers, the premiums corresponding to the age of the marquess in 1829 would have been so much larger than those corresponding to his age in 1819, 1822, and 1826, that after allowing for these premiums, they could only have paid a smaller price for the portion of the annuity remaining. It was therefore a matter of accommodation to the marquess, that, in place of new policies being effected in 1829, the old policies should be conveyed to the company. And the company, in assenting to this arrangement, incurred various risks, such as the chance of failure of the funds of any of the equitable offices — the chance of an erroneous statement as to age, health, &c., having been made when the policies were originally effected, &c. In return for these and similar risks, it was only just that if profit emerged the company should benefit by it. Accordingly the policies had been sold and conveyed out and out, with all right and interest in them, “or in or to any claim, advantage, or benefit, which may arise thereby in any manner of way.” The only right remaining in Lord Queensberry was that of redemption, which, however, he had never exercised. It was owing to this right that the company had temporarily reduced the rate of annuity when interest was low; but the existence of the right did not alter the nature of the transactions. On his death, the company, as purchasers of the policies, were entitled to appropriate the whole proceeds, just as much as if, in place of having had policies conveyed to them, they had opened policies themselves with other

Queensberry v. Scottish Union Insurance Company.

offices, or had stood their own insurance. They did effect one policy for £1,000 with the Palladium Office, and their right in the other policies was just as broad as in it. They were not farther bound, even in the event of the annuity being redeemed, than to reconvey the policies "held by them at the date of the redemption;" and that did not bind them to keep up any of the policies during the not redemption. They could have dropped these policies at pleasure; and if they chose to be at the expense of keeping them up, they were entitled to the whole benefit thence arising.

The lord ordinary reported the cause on cases.¹

LORD PRESIDENT. It appears to me that the policies were only conveyed to the insurance company in security of the sum advanced by them, and that after the company are fully satisfied for their advance out of the proceeds of the policies, they have no farther right or interest in these proceeds. It is true that the assignation of the policies bears, *ex facie*, to be granted out and out; but it is plain that it was meant only to be granted in security of the advance. The real evidence arising from the circumstances of the transaction, together with the letters of the parties, shows this.

LORD GILLIES. I have bestowed on this case the best consideration in my power, and I have arrived at the conclusion that the insurance company are not entitled to retain the sums added by way of bonus, over and above the principal sums insured. I am satisfied that their acquisition of funds to an amount exceeding £29,980, their whole advance, was not contemplated by Lord Queensberry at least, as the effect of the conveyance executed by him, if indeed it was originally contemplated by any party at all.

LORD MACKENZIE. I concur. Some difficulty is occasioned by the absolute terms of the conveyance of the policies, which, *ex facie*, gives them out and out to the insurance company. But in equity, and looking to the actual nature of the transaction, I hold that the bonuses accruing on the policies do not belong to the company. In arriving at this result I do not consider it necessary that the court should absolutely find that the advance of

¹ "The lord ordinary reports cases to the court, partly because he considers the question as attended with considerable difficulty, but chiefly on account of its novelty, — both parties being agreed that no such case has ever occurred before."

£29,980 was simply a loan in point of form and expression. We sit here as a court of equity as well as law, and we have power to restrain the effect of words used, when they are clearly proved to go beyond the true intent of the parties. The intent here was, that there should be a reproduction to the insurance company of the £29,980 advanced by them, and that this should be effected out of the policies to which a right was for that purpose conveyed to them. It is not material whether that sum of £29,980 is said to be advanced, or to be lent, or is described by the use of other terms; the whole that was looked to by parties on both sides was, that whether there should be redemption or non-redemption by the marquess in his lifetime, the whole sum advanced, £29,980, should be reproduced to the insurance company out of the subjects conveyed to them. That is my entire and thorough conviction, looking to the whole transaction. And that being so, I hope that, although the words which were used in the deed go farther than this, that plainly arose from the oversight of the parties, and we may restrain the words within their true and genuine intent. I should have been of the same opinion, however great or however small the bonuses had happened to be. They might have been as large as the whole advance of £29,980 itself; or, by possibility, they might have been even a much larger sum. In that event, just as in the present circumstances, I should have held, that although the marquess died without redeeming the annuity, the insurance company were not entitled, after repaying their whole advance of £29,980 out of the policies, to have farther retained £29,980 more, had the bonuses amounted to so much, although the terms of the conveyance of the policies to them, when literally taken, imported such an assignation. Even if no power of redemption at all had existed, I should have arrived at the same result, so soon as the fact was sufficiently made out, that, according to the true intent of both parties, the object of the transaction was to insure the full reproduction to the insurance company of the sum of £29,980 advanced by them. I regard the existence of a power of redemption by the marquess as being important in the present question only in so far as it is an element of evidence in proving the fact that the true intent of the parties was that which I have just stated.

Lord FULLERTON. I cannot concur in the opinions now delivered. The question is certainly not free from difficulty.

But in determining it, we must look at the true legal character of the transaction between the late Marquess of Queensberry and the defenders, and not be misled by the resemblance which, when viewed inattentively, it bears to one of a totally different kind. This is the more necessary as the whole pleas in law of the pursuers seem to be founded on this misapprehension.

The true character of the transaction is to be sought for in the deeds by which it was completed. By the bond of annuity, the marquess obliged himself to pay £3,090 during his life, in consideration of an advance of £29,980. If the matter had stopped there, the defenders might have insured or not, as they chose; and, if they had insured, might have dealt as they chose with the policies. But an additional part of the bargain was, that the marquess should give, and they receive, policies already standing in his name to the extent of £26,000; and accordingly the marquess and his trustee executed an assignation of these policies to the defenders.

According to these deeds, then, the transaction was one by which the defenders paid down to the marquess £29,980, on consideration of receiving first, an annuity on his life for £3,090, and secondly, the transference of the policies of insurance.

And there can be no doubt as to this transference, including the whole interest of every kind held by the marquess under the policies. For in regard to such of them as admitted of a bonus, or addition to the sums originally insured, the recital of the deed in describing them expressly mentions "such farther sum or sums as shall, under the regulations of the said company, be appropriated as a bonus or addition to the policy."

There was farther reserved to the marquess the right of redeeming the annuity; and on his doing so, he was entitled by the admitted terms of the bargain to demand a reconveyance of the policies.

Now, it may be admitted that a transaction of this kind bears, in some particulars, a resemblance to a loan; and it is not very wonderful that, on the part of the marquess and those acting for him, it should be so described. There was, in the first place, an advance of a sum of money. Secondly, there was an annual return stipulated for by the party who advanced it, and the return or rate, as it is termed in the correspondence, was of course calculated with reference to the ordinary rate of insurance.

Thirdly, the annual return was dependent in some measure on the fluctuation of the ordinary rate of interest, for the obvious reason that the marquess's power of redemption always enabled him to put an end to the transaction as soon as he found he could make another on more favorable terms. But this was an advantage available exclusively to him ; for, however high the market rate of interest might have risen, the defenders were irrevocably bound to confine themselves to the stipulated annuity. And this at once leads to the manifest and irreconcilable distinction between such a transaction and a loan.

It is essential to the existence of the contract of loan, that the lender should have the right of demanding payment. Now, here, there was no such right ; neither during the marquess's life nor after his death could the defenders make any demand whatever against him or his representatives. No doubt the marquess had it in his power, in virtue of his right to redeem, to place himself nearly in the same situation as if it had been a loan. On paying back the money, he might have extinguished the annuity, and recovered the policies. But he did not do so ; and at his death, when of course all right of redemption was at an end, the respective rights of the parties, the executors and the defenders, must stand on the deeds ; by which deeds it appears clearly to me that there was no loan, but an absolute and irrevocable advance of money on the one hand, in return for an absolute surrender of the policies on the other.

In these circumstances, I cannot listen to the pleas in law for the executors, all of which assume that the policies were assigned in security of the advance of £29,980. It is clear that, in the proper and legal sense of the term, the assignation was not and could not be a security, because there existed, on the part of the receiver of the advances, no obligation to which it could be subsidiary. The policies were absolutely acquired, in consideration of the advance ; and in regard to any legal consequences, they cannot be said to form a security in any other sense than that in which any right or thing acquired by purchase may be said to be a security, that the acquirer shall not be a loser by paying the price.

Neither can I listen to the argument when put on the more general ground that this is a case in which equity should interpose to modify the transaction, according to the supposed intention of parties.

In the first place, I think all constructions of this kind are excluded by the express terms of the deed. There is here no omission, and no ambiguity of expression, which leaves room for any purely equitable construction. The terms of the assignation show that the parties had in view every right attending the policies, including in express terms any bonus or sum appropriated in addition to the amount originally insured.

Secondly, I see nothing in the circumstances of this case which warrants me to assume that the parties had any intention different from that which the deed bears. After all, the transaction, like every one depending on policies of insurance, was, to a certain extent, one of risk. In the first place, there was the risk, however small it practically might be, of the failure of the insurance company; and, secondly, there are various risks by which the value of the returns under the policies might have been materially diminished, or even extinguished. If the marquess had gone abroad without notice, the premium might have been materially increased; and on various contingencies, of inaccurate description of age or state of health, &c., all claim on them might have been cut off. And though in the annuity bond claims of damages on such grounds are reserved against the marquess and his representatives, such claims, contingent and uncertain in amount, could not be protected by the heritable security.

Lastly, all pretence for the interposition of equity is here excluded, as the party interested, the late marquess, had, by the terms of the bargain, the best means of protecting himself against any supervening inequality in its terms. To the day of his death he had the option of putting an end to it, if he or his advisers considered it to be unfavorable, — an option the defenders had not, who, if any loss was incurred, must have borne it, without any redress. He did not choose to exercise that option; and it appears to me, that to sustain the present claim of the executors against the defenders, for any surplus arising under the policies, would be to make a bargain for the parties different from that which they had made themselves, and substantially to enable the executors to redeem the annuity after the death of the marquess, out of the proceeds of those very policies which stood at his death absolutely and irrevocably conveyed to the defenders.

Gibson-Craig v. M'Alpine.

On these grounds, I am for sustaining the defence contained in the first plea in law for the defenders, which forms in itself a complete defence against the conclusions of the action.

THE COURT pronounced this interlocutor: "Find that the defenders are bound to account for and make payment to the pursuers of the bonuses or profits claimed, in terms of the conclusions of the libel, and remit to the lord ordinary to ascertain the amount thereof; but find no expenses due."

SIR JAMES GIBSON-CRAIG *et al.*, pursuers; DUNCAN M'ALPINE
AND ARCHIBALD M'ALLISTER, defenders.

(5 Court of Session Cases, 2d series, 227. 1842.)

A reversion company made an advance to a party on condition, *inter alia*, that he should open a policy on his life, and for payment of the annual premiums to accrue thereon, he and another, as cautioner, granted their joint obligation; these parties having failed to make payment of the premiums, the directors of the company opened a policy in their own names on the principal party's life. *Held*, in an action to that effect, that the reversion company were entitled to payment by the said two parties of the premiums on the policy so opened by them, as indemnification for the failure to implement the obligation entered into.

IN 1836, the Northern Reversion Company, for which the pursuers, Sir James Gibson-Craig and others, were trustees, made a cash advance to the defender M'Alpine, in consideration of which they received from him a disposition and assignation to his right and interest in the fee of certain trust funds, then life-rented. The advance was made on the further consideration, that a policy for £1,000 should be opened on his life with the Edinburgh Life Assurance Company, and that M'Alpine and the other defender, M'Allister, should grant a joint obligation for payment of the premiums annually to accrue thereon. M'Alpine and M'Allister accordingly executed and delivered to the secretary of the Reversion Company on the 18th October, 1836, an obligation to the above effect. These parties failed to fulfil the obligation, and allowed the policy to fall, by omitting to advance and pay to the insurance company the premiums which fell due in the autumn of 1840, and this at the very time when the agents for the Reversion Company were requiring them by letter to exhibit vouchers for the premiums. No other policy having been effected by M'Alpine and M'Allister in lieu of the

expired one, although time was allowed for doing so, the directors of the Reversion Company, with a view to their own indemnification, opened a policy in their own names as trustees for the company, on M'Alpine's life, at the expense of him and M'Allister.

Thereafter Sir James Gibson-Craig, and the other trustees of the Northern Reversion Company, libelling on the obligation of October, 1836, and the circumstances mentioned above, raised an action against M'Alpine and M'Allister to have them ordained to make payment to the pursuers annually of the amount of the premiums on the subsisting policy; the pursuers, as trustees, being bound, in the event of the policy being so kept up by funds provided by the defenders, to apply whatever sums might eventually be recovered by the pursuers, in virtue of the policy, to the same purpose to which any sums which might have been recovered under the lapsed policy, if it had remained in existence, would have been applicable, in terms of the assignation in security abovementioned.

In defence, it was pleaded, *inter alia*, that in no view could the obligation of 18th October, 1836, warrant a higher demand against the defenders than payment of the annual premium under the old policy of 1836, which had been abandoned by the Reversion Company; and that M'Allister, being a cautioner, could not be sued till his principal, M'Alpine, had been discussed.

The lord ordinary pronounced a special interlocutor, finding the facts above narrated; and his lordship "therefore repels the defences, and decerns against the defenders, jointly and severally, in terms of the libel: Finds expenses due to the pursuers, as the same may be taxed by the auditor, and decerns; but declaring always, that in the event of the pursuers ultimately receiving full payment of their debt advanced to the said Duncan M'Alpine, and of the whole premiums paid for the assurance of his life, and all expenses incurred, or to be incurred, in liquidating their just claims in the premises, they shall be bound to assign and transfer the said policy to the defenders, or either of them, who shall instruct their right thereto when the pursuers' legal claims are finally satisfied."

The defenders having reclaimed,

THE COURT adhered, finding additional expenses due.

CHRISTOPHER WOOD, pursuer ; ROBERT ANSTRUTHER and
JAMES RENTON, defenders.

(6 Court of Session Cases, 2d series, 291. 1843.)

Right in security. Insolvency. Sale of policies. — A debtor conveyed in security of a loan, certain policies of insurance which had been effected upon his life, binding himself at the same time to pay the annual premiums; the creditor on the other hand became bound, on the sums assured becoming payable, to apply them in extinction of his debt, and to account to the debtor for any balance that might remain over. The debtor became insolvent, and failed to pay the premiums which were advanced by the creditor to prevent the forfeiture of the policies; in these circumstances, it had been found by a judgment of the court, that the creditor was entitled to sell the policies, and to apply the proceeds in payment of the premiums advanced by him. *Held*, (in a subsequent action to that effect,) that he was also entitled to bring to sale the obligation of the debtor to pay the premiums.

SEQUEL of the case reported June 4th, 1842. See 4 Court Sess. Cas. 2d series, 1363; also head-note, *supra*, for facts.

Under the judgment formerly reported, Mr. Wood exposed to sale the policies of insurance in question, but failed in getting them sold, in consequence of Mr. Anstruther's obligation to pay the premiums not having been exposed for sale along with them. A conclusion had originally been introduced into the summons as to the pursuer's right to bring this obligation to sale along with the policies; but this having been opposed by the defenders, the pursuer ultimately gave in an amendment of the libel, withdrawing the conclusion for selling the obligation to pay the premiums.

Thereafter Wood raised a new action, narrating that since the date of the former judgment, Anstruther had still failed in paying the premiums, and that they had been paid by the pursuer himself to prevent forfeiture, and concluding that it should be declared that he was entitled to dispose of the policies, and of the relative obligations undertaken by Anstruther for payment of the annual premiums, and also of the securities held by the pursuer for payment of the same, unless Anstruther should within a given time pay up to the pursuer the bygone premiums advanced by him, and find caution for the future payment; and that it should be further declared that the pursuer was entitled to apply the proceeds realized by the sale in payment of the premiums already advanced by him, the remainder, if any, to be applied in extinction *pro tanto* of the principal debt; and further, that it should be declared, that the obligation which the pursuer had come

under, on the sums assured becoming payable by the death of Anstruther, to apply the amount in extinction of his debt, and to account for any balance that might remain after sale, should be void and extinguished, and that Anstruther had lost and forfeited all interest in this obligation in the policies, to the parties purchasing the same; reserving to the pursuer all the obligations by Anstruther entire and unaffected in other respects.

Anstruther and the trustee for his creditors (Mr. J. Renton) gave in defences to this action, in which they contended that in the bond granted by Anstruther there was a relative obligation on the pursuer, "on the sums assured becoming payable, to apply the same, so far as necessary, in extinction of the sums, principal and interest, due under the bond, and to pay and account to Anstruther, and this for whatever balance might remain in his hands after satisfying the same;" and further, that in the event of repayment by Anstruther, in terms of a clause of redemption contained in the bond, the pursuer was to be bound to reconvey to him the policies of insurance. The pursuer was now asking for a decree, the effect of which would be to declare that the sum to be ultimately drawn from the policies was not to be applied in extinction of his debt, for the security of which they were granted, but were to be paid to some third party who might become by purchase the assignee to them. The effect of this was to entail a double debt on the defender, as the original debt still remained; and it was proposed that the defender, who was still to continue to pay the premiums, should thus take upon himself an annuity debt of an equivalent amount, in favor of a third party — each of these two debts also remaining secured over the defenders' estate. The defender would thus remain bound to keep up the policies, while by doing so he would not secure the object for which they were entered into, viz., that of extinguishing the pursuer's debt.

The defenders further pleaded:—

1. The action is excluded by *res judicata*.
2. It is further excluded by the judicial waiver, in the former proceedings, of the claim now made.
3. At all events, the pursuer cannot try the question judicially waived in the former action, without paying the expenses of that action.
4. The claim now made is groundless, inasmuch as the pursuer cannot directly or indirectly hold the defender, Mr. Anstruther,

Hutchison v. National Loan Fund Life Assurance Society.

bound to continue payment of the premiums on these policies whilst the correlative stipulations as to the application of the sums in the policies is not merely to be not enforced, but is avowedly to be departed from and nullified.

The lord ordinary pronounced this interlocutor: "Repels the defences, and decerns in terms of the conclusions of the libel, with these explanations, viz.: 1st, that the sale must be by public auction, and on articles and previous advertisements prepared by the clerk, to whom a remit for this purpose is hereby made; 2d, that the sale shall not be proceeded with, provided that, previous thereto, the defender shall, under the alternative part of the first conclusion, satisfy or pay to the pursuer the bygone premiums, with the interest thereon. Finds the defenders liable in expenses."

The defenders reclaimed, but THE COURT, without hearing counsel for the pursuer, unanimously adhered.

THOMAS HUTCHISON *et al.*, (Armstrong's assignees,) pursuers;
THE NATIONAL LOAN FUND LIFE ASSURANCE SOCIETY,
defenders.

(7 Court of Session Cases, 2d series, 467. 1845.)

Statements in proposal. Belief. Latent disease.—The proposal for a life insurance and relative declaration, which formed the basis of the contract in the policy subsequently granted, contained a declaration that the party had no disease or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstance or information touching health or habits of life, with which the insurers ought to be made acquainted, was withheld. *Held*, that this imported a declaration only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease, material to the risk, and did not import a declaration against any latent imperceptible disease, that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time.

IN April, 1843, Mrs. Armstrong, Leith, effected an insurance upon her life for £499 19s. with the agent in Edinburgh for the National Loan Fund Assurance Society of London. She died on 28th October following, having assigned the policy to Thomas Hutchison and two others. These parties raised an action upon the policy against the insurance company, who defended upon the ground of breach of warranty on the part of the insured, alleging that, at the date of the insurance, she was of intemperate habits, and laboring under disease of the liver which resulted in dropsy, of which she died.

This being denied by the pursuers, the case was sent to the issue clerks who returned the following issues :—

It being admitted that, on the 4th April, 1843, the defenders granted the policy of insurance No. 5 of process, whereby, in consideration of a certain premium, and on certain conditions therein set forth, the defenders agreed to pay to the executors, administrators, or assignees of the said Mrs. Ann Paton or Armstrong the sum of £499 19s. after her death, and that the right of the said policy is now in the pursuers, as assignees of the said Mrs. Ann Paton or Armstrong :

It being also admitted that, on the 28th October, 1843, the said Mrs. Ann Paton or Armstrong died : “ Whether the defenders are indebted and resting owing to the pursuers the said sum of £499 19s., contained in the said policy, or any part thereof, with interest thereon from the day of February, 1844 ?

“ Or, whether, by fraudulent misrepresentation, or undue concealment as to health or habits of the said Mrs. Ann Paton or Armstrong, the defenders were induced to grant the said policy ? ”

The defenders were dissatisfied with the counter issue, and proposed the following instead :—

“ Or, whether, on the part of the said Mrs. Armstrong, there was a breach of the conditions on which the said policy was granted, or by fraudulent misrepresentation, concealment, or non-communication of information touching the health and habits of the insured, the defenders were induced to grant the said policy ? ”

The lord ordinary made *avizandum* with the record (unclosed) and issues to the court, who remitted back to his lordship to hear parties further on the first two pleas in law maintained by the defenders. These pleas were as follows :—

1. Mrs. Armstrong, in whose right alone the pursuers stand, undertook a legal warranty that the statements and allegations contained in the proposal, declaration, and relative documents, were true, by agreeing that they should form the basis of the contract between her and the defenders.

2. The policy libelled is void, in consequence of a breach of this warranty.

The statements, the legal import and extent of which formed the question between the parties as to the terms of the issues,

were contained in the answer to the tenth query in the "proposal for insurance," a printed form of the society, and in the declaration by the insured appended thereto. The query was, "Has the party an habitual cough, or any disease or symptom of disease?" and the answer was, "No." The declaration appended was in these terms: —

"I do hereby declare that the age of me, the above named, does not now exceed forty-three years; that I am now in good health, and do ordinarily enjoy good health; and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health or habits of life, of me the said Ann Armstrong, with which the directors of the National Loan Fund Life Assurance Society ought to be made acquainted. And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said society; and that if any fraudulent or untrue allegation be contained herein, or in the proposal, all moneys which shall have been paid on account of such assurance shall be forfeited to the said society, and the policy void. Dated this 28th day of March, 1843.

"Ann Armstrong.

"Witness: John Henderson."

The policy recited the proposal and declaration, and contained this provision: —

"Provided always, that in case any fraudulent or untrue allegation be contained in the said declaration, or in the proposal therein referred to, or in any of the testimonials or documents addressed to and deposited with the said society, in relation to the said assurance, then this policy shall be void, and all moneys paid thereunder shall be forfeited to the said society."

The statement as to health, the pursuers maintained, amounted only to this, that the insured was free from any apparent or sensible disease, or symptom of disease; while the defenders, on the other hand, maintained that they amounted to an absolute warranty, not only that the insured had never felt herself to be affected with any complaint, or exhibited any symptom of complaint requiring to be disclosed, but that, whether felt or not, no disease in any form existed in her constitution, and contended that they ought to be allowed an issue, under which they would

be entitled to a verdict, upon proving that, at the date of the insurance, such disease existed in the constitution of the insured, whether she knew, or could possibly have known of it, and whether it had the effect of shortening her life or not.

The lord ordinary ordered minutes of debate, and made *avizandum* therewith to the court, issuing the subjoined note.¹

¹ “The state of the proceedings is so far explained by the interlocutors of 19th March, and 12th and 18th June, 1844. It is only necessary to add, that the record was afterwards closed on the 5th July, and that it was considered to be advisable that the argument of the parties upon the question raised by the defenders on the warranty in the contract of insurance should be put into writing. This has been done, and the lord ordinary now reports the case to the court.

“One thing is quite clear, that in determining the question of law, which it was thought should be decided before the trial, with a view to which the issues formerly reported were prepared, the court cannot be in the slightest degree influenced by the consideration thrown out by the defenders, that insurance companies are not in the custom of taking objections to payment of a policy on the ground of slight deviations from the statements or declarations embraced by the warranty on which the contract is founded, and that it is only where they have reason to suppose that there has been some degree of fraud or improper practice in effecting the insurance, that they avail themselves of the strict rules of warranty in resisting compliance with a demand for implement. Whatever may be the bearing of insurance companies to liberality in dealing with claims upon them, the court, in deciding whether the plea on which the defenders rely be well founded or not, must look only to what the principle contended for by them in point of law, would go, and what it would give them a right to, and not to the way in which they might be disposed to act upon it.

“The present case, in so far as now brought before the court, relates entirely to a question of law arising upon the warranty in the contract which was entered into with the defenders.

“It will be observed, that there is no point raised with respect to the law of the contract in the matter of warranty, where, in answer to a general query — such as, whether the party whose life is insured has any disorder tending to shorten life — the party has made a false statement, either in the knowledge of its untruth or without excusable ignorance of its untruth; where, in answer to such query, or contrary to the terms of the declaration, the party has withheld either wilfully or by negligence or inattention, or from an innocent belief it may be that they were unimportant, facts which the insurers allege ought to have been communicated to them, and the statement of which, in the one case, or the non-communication in the other, they contend infers a breach of warranty. In these cases, it is not disputed that it must be left to the jury — with such directions as the court may think necessary — to say whether the facts referred to were of such materiality that their suggestion or suppression ought to vacate the policy.

“Further, there is strictly no point here raised with regard to the legal rule

LORD PRESIDENT. If I thought the view pressed by the insurance company was law, I should say there was an end to all

applicable to the case, where in reference to any of the specific things made the subject of special inquiry, and receiving a special answer by the insured, (as, for instance, in relation to the particular diseases mentioned in query nine of the proposal to which the declaration refers,) an untrue answer shall have been returned, not only not knowingly, but in excusable ignorance of the real state of the fact.

“The law as to this may bear upon the law of the matter actually presented for disposal, but that matter itself is wider in its scope, and affects more extensively the right and interests of parties under contracts of insurance on lives.

“The *tenth* query in the proposal of insurance on the life of the late Mrs. Armstrong is, ‘Has the party any habitual cough, or any disease, or symptom of disease?’ The answer is, ‘No.’ Then, in the declaration appended to the proposal, Mrs. Armstrong declares, *inter alia*, that I am now in good health, and do ordinarily enjoy good health; and it concludes as follows: ‘And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said society; and that if any fraudulent or untrue allegation be contained herein, or in the proposal, all moneys which shall have been paid on account of such assurance shall be forfeited to the said society, and the policy void.’ In the policy issued upon this proposal and declaration, the declaration is embodied, and amounts, it is said, to a conditional warranty, which must be strictly true or complied with, and upon the truth of which the whole contract depends.

“The defenders allege that there has been a breach of the warranty thus undertaken by the insured. And, without going into the details, it will be found that their plea upon the warranty results in this, if it shall be proved that, at the date of opening the policy, Mrs. Armstrong was not healthy, or free from disease, but was affected by a particular disease, (not being, however, one of those particularly mentioned, and in regard to which a special query was put and answer given,) this amounts in law to a breach of warranty, although, to all appearance, and so far as her knowledge went, she was at the time in perfect and robust health, and had no disease whatever; and although there may have been no negligence or want of attention to render her actual ignorance inexcusable, the disease alleged to have existed never having exhibited itself, and being, while present in the frame, entirely undiscernible to all ordinary or even the most skilful observation. The plea of the defenders seems truly to amount to this, and it is upon it — with certain qualifications (to be immediately adverted to) as to the nature and extent of the disease, which the defenders seem to be disposed to admit may still be left to the jury, under the direction of the judge who tries the cause, — that the opinion of the court is desired; and it is impossible to disguise that, whatever may be the difficulties involved in it, it raises a point of immense importance to all those interested in life insurance, taking it apart, as it must be taken, from the feelings of liberality by which insurance companies may generally be influenced in settling claims made upon them.

life insurance in time to come. But I conceive that the doctrine of warranty is pushed by them to an extravagant length. Though

“The doctrine of warranty, as it seems to be recognized in England, is a very strict and stringent one. Warranty, it is said, is a condition precedent, and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misrepresentation, or any other cause, the contract is binding if the warranty be complied with, but not otherwise; and in the compliance with warranties there is no latitude to, no equity; the only question is, has the thing warranted taken place or not?”

“Holding this to be the doctrine generally, the question is, how and to what effect it operates in its application to the present case?”

“It will be kept in view that the defenders, in relation to the general warranty as to the party having any disease, or symptom of disease, and being in good health, and ordinarily enjoying good health, which, they contend, applies to unknown and entirely latent diseases, explain that the warranty must be taken in a reasonable sense; that in that sense the statement of the party must be true, and if not, there is a breach; and that, according to that reasonable sense, ‘any disease or symptom of disease,’ in the above query, is to be held to mean any disease which would tend to shorten life or to make the life of the party insuring not an average risk, or not an insurable life, on the ordinary rates of premium. Defenders’ Revised Case, p. 29.

“It seems indeed to be clear, upon the English authorities, that a general warranty as to health, or having no disease or symptom of disease, in those cases to which it applies, (whether it does apply to the case of an ordinary latent disease is the point here in dispute,) is sufficiently true, if the party be in a reasonable state of health, and not laboring under any disease tending to shorten life, that is, a disease which has in general that tendency, so that the party’s life may be insured on the common terms for a person of his age and condition, and not any disorder, however trifling, with which the most healthy may occasionally be affected; for although, in one sense, every disease may tend to shorten life, and no person is without the seeds of some disease in his frame, no policy could stand were the mere existence of either to be held to be a violation of the warranty, inferring the voidance of the contract. But the warranty has not received that construction, which has been considered to be contradicted by the plain meaning of the parties entering into the contract, whose intention must be found out by reference to the subject matter. *Marshall on Insurance*, p. 70; *Ellis*, p. 107; *Willis v. Poole*, 2 Park, 650.

“If then the part of the warranty referred to applies at all to latent diseases, it is not every disease, but only a disease of the description which has been explained, which will make a breach of the warranty; and it thus appears, that the warranty is so far subject to construction, and to the principle of construction, that it is to be taken in a reasonable sense. In this there is no departure from the strict doctrine of warranty. It only grants what is perfectly consistent with that doctrine, that the statements in the proposal and declaration, with regard to health or disease generally, are open to construction; and that, according to a sound construction of them, with reference to

there are equivocal expressions in the authorities, I think it is impossible that it could be meant in any of them to be laid down,

the subject matter, the warranty undertaken is no more than a warranty to the above effect. And that being the case, it is equally true that the plea of the pursuers upon the warranty by the foresaid statements in the proposal and declaration, that it does not extend to entirely latent diseases, does not import a repudiation of the legal doctrine of warranty, or that what is warranted must be literally and strictly fulfilled. It only raises a question upon the true meaning of the contract, and the extent of the warranty, which by these statements is undertaken.

“If a disease having the effect mentioned, that is, tending to shorten life in the sense in which that is understood in a contract of insurance, or having an influence upon the value of the life of the party insured, which would affect the terms of the contract, or preclude its being entered into, be proved, to the satisfaction of a jury, not merely to have existed at the date of the policy, but to be in operation, in such a way that the party must either have had actual knowledge of it, or must in law be held to have had knowledge of it, it cannot be disputed that a breach of the warranty would be incurred. But the defenders contend that the warranty is to this extent, that if a disease of the nature, and having the influence upon the value of the life of the party insured abovementioned, existed at the date of the policy, the warranty is broken, notwithstanding that the disease was not the cause of death and was absolutely and most innocently unknown, being one of an entirely latent kind, although it may have been silently doing its work upon the constitution, so that all that is to be left to the jury is its existence at the date of the policy. The pursuers, on the other hand, contend that the warranty, according to a sound construction, does not comprehend, and is not broken by existence of a disease of the above description, and having the effect mentioned, if it was a disease which had never exhibited itself, and which was not only not known to the party, but of which — there being no cause to give a knowledge of it — the party was not only actually but innocently ignorant.

“This being the state of the question, the whole matter turns upon the relevancy of a statement and offer of proof in relation to the bodily condition of the party insured, as respects disease or health at the date of the contract, which contains no averment of knowledge, or inexcusable ignorance equivalent to knowledge, by the party, of the alleged disease or state of health, as a ground on which the contract can be found to be voided, in respect of a breach of the warranty undertaken by the insured by the answer to the last portion of query ten, and the declaration that the insured was then in good health and ordinarily enjoyed good health.

“Now, holding that in construing the warranty the intention of the parties must be found out by reference to the subject matter, it is difficult to see how the declaration of the party insured, that ‘I am now’ (that is, at the date of the policy) ‘in good health, and do ordinarily enjoy good health,’ can be held to import a warranty or undertaking by the policy that he is free not only from any disease which has positively affected his health, but from any latent

that what is called a warranty in regard to the person effecting an insurance, is more than a warranty of what was known to the

disease tending to shorten life, although it has never sensibly affected his health; and that the declaration must be true in the latter sense in order to support the policy. Such a declaration, it is thought, in its natural and obvious meaning, imports an answer to an inquiry capable of being answered by the party at whom it is made; and, therefore, has reference to the apparent and known condition, present or past, of the individual as respects his actual enjoyment of good or bad health, or to his positive experience in regard to health, and not to the possible existence of some disease, which, however injurious in its character, has had no perceptible influence upon the health, or no influence which can impeach the truth of the declaration, — applying it to the feelings and experience of the party, — that he is in good health, and ordinarily enjoys good health. To extend the warranty undertaken by such a declaration, so as to make it embrace the latter case, would be an excessive stretch of its meaning, if indeed it will, by any violence, admit of that meaning being put upon it. But the defenders are not in a position to entitle them to ask that the warranty shall receive any strained construction against the insured. If they meant the declaration to be made in the sense which they seem to contend it bears, they ought to have taken care that, by the words used, no doubt of their meaning was left.

“But to the query, ‘Has the party an habitual cough, or any disease or symptom of disease?’ Mrs. Armstrong answers ‘No.’

“It may be that where the non-existence of a particular disease, or the non-existence or existence of a particular thing, which must either be known to the party insured, or the knowledge of which, from its nature, he may be supposed either to have or to be able by due inquiry to obtain, is made a condition of the contract, there will be a breach of warranty voiding the contract, if the statement of the party in relation thereto be not strictly and literally complied with, without regard to the materiality of the disease or thing, as affecting the terms of the contract, or to the views on which they may have been introduced. It may be enough to release the insurers, that, as a condition precedent, the statement had not been fulfilled by the insured. Some of the English authorities, however, seem even in such cases to recognize a certain relaxation of the severity of the rule; that is, they recognize the admission of the consideration of whether the variance in fact, from the thing as stated in the proposal or declaration, is such as be at all substantial, or of any moment, with reference to the matter on which information was desired by or given to the insurers.

“But be that as it may, it is a grave question whether, in the case of a statement in regard to a disease specifically mentioned, and still more in the case of a statement in regard to diseases generally, the warranty could be construed or held to apply to an entirely latent disease, the insured’s ignorance of which was not attributable to negligence, but was perfectly innocent and excusable. At the same time it is not to be denied that the English cases, as reported, afford at least indications of opinion that the insured, by such a

person or should have been known, unless he was guilty of gross and inexcusable negligence. I think it is impossible to conceive

warranty, takes the risk of the existence or not of any disease specifically mentioned, and that if it turns out to have existed, although latent and unknown, there is a breach of the warranty. Nay, further, there is a like indication of opinion even with regard to a warranty in reference to disease generally, such as is here undertaken by the answer to query ten, if it shall be proved that at the date of the policy the insured was affected by a disease, latent though it were, tending to shorten life, in the sense of these words, in a contract of life insurance.¹

“Several of the cases apparently cited by the defenders as going this length by direct decision certainly cannot be founded on to that effect: 1st, Because the point involved in them either related to the non-disclosure of facts known, and turned upon the materiality of the facts; or, 2dly, Because they were cases of insurance by a third party on the life of another; and while it might be true that ignorance of the alleged disease existed on the part of the individual making the insurance, it was not said that the party whose life was insured was not aware or was excusably ignorant of its existence, and that *quoad* him it was actually, or in a legal sense, a latent disease; and it was held that the ignorance of the insured was immaterial if there was actual knowledge of the disease, or its equivalent, by the party whose life was insured. And it is to be observed that several of the passages in the opinion of the judges founded on by the defenders are the less to be relied on as supporting their plea, seeing that they occur in cases of the description last adverted to, where the point turned upon the ignorance of a party making insurance upon the life of another; a remark which applies to the case of *Duckett v. Williams*, which came before the court a second time in 1834, upon a claim by the insured for return of premiums, and which is appealed to by the defenders as containing, in the law as there laid down, by the present lord chancellor, then chief baron, decisive authority in their favor.

“At the same time, taking the whole of his lordship’s opinion as reported, there is nothing in the course of reasoning on which it proceeds, or the way in which the argument is put, which necessarily excludes its application to a case of ignorance in a party effecting an insurance upon his own life; and if it was meant to apply to that case, then it announces a doctrine which would go all the length contended for by the defenders. But in considering whether it was so meant or not, it is always to be recollected that the actual case before the court related to the effect of the ignorance of a third party insuring upon the life of another — that it was with reference to his ignorance that the opinion was delivered — and that it does not appear from the report whether, although he might be ignorant, and innocently ignorant of the existence of the alleged disease, it was not a disease known to the party whose life was insured, or of which he could not be excusably ignorant, so that it may be, that when his lordship stated the knowledge of the party to be clearly immaterial, he referred

¹ *Ross v. Bradshaw*, 1 W. Bl. 312; *Watson v. Mainwaring*, 4 Taunt. 763; *Duckett v. Williams*, 2 Crompt. & M. 348; *ante*, p. 8.

Hutchinson v. National Loan Fund Life Assurance Society.

that the warranty goes farther. The doctrine pressed by the insurance company just amounts to this, that when a person insured

merely to the knowledge of the third party effecting the insurance, and had not in view the case of a disease, the existence of which was altogether and innocently unknown to every one, and therefore did not intend to lay it down as law, that the declaration as to the state of health and absence of disease is untrue in the sense of the policy, and a breach of the warranty consequently, if a disease tending to shorten life exists, although it be entirely latent, and not within the knowledge of the party himself said to be affected by it.

“After a careful examination the lord ordinary is by no means satisfied, that, from the cases decided in England, it can be held that the doctrine maintained by the defenders has been there clearly and unqualifiedly recognized, and he entertains the greater doubt of this being really the true import of what is reported to have fallen from the bench, from seeing that in the case of *Swete v. Fairlie*, in 1833, (6 Carrington & Payne, p. 1,) where the insurance was by a third party on the life of another, who had signed the declaration along with the party effecting the insurance, — Lord Denman, in charging the jury, after remarking upon the evidence relating to the materiality of the facts, in regard to the state of health of the insured, which had not been communicated, observed, ‘But it does not appear that Mr. Abraham’ (the party whose life was insured and who had signed the declaration) ‘was aware of the facts, and this will raise a very important question of law, if you should think that there was concealment of facts material to be communicated, and therefore the two questions which I shall leave to you will be, first, whether you think Mr. Abraham represented truly the state of his health, according to the question put to him; and secondly, if he did not, did he know the state of health in which he had been, so as to furnish a proper answer to that question?’

“The result is thus reported: ‘The jury said they thought Mr. Abraham was not aware of what had taken place, and could not therefore communicate it, and they found a verdict for the plaintiff.’

“The lord ordinary does not find that this verdict was followed by any further proceedings; and, looking to what was stated by Lord Denman, it must be presumed that the point, which his lordship suggests, would — if it arose upon the facts — raise a very important question in law, was not a point then definitively settled and ruled by prior decisions; and the only later one that has been referred to is that of *Duckett v. Williams*, which had been previously tried before Lord Lyndhurst, chief baron, and, as already noticed, afterwards came on in 1834 in another shape for judgment, when the opinion relied on by the defenders was delivered by his lordship.

“Considering the question upon its merits, the lord ordinary, as at present advised, is unable to concur in the plea upon the warranty which is maintained by the defenders. He cannot think that it can be held to be the meaning and intention of the parties to the contract — collecting it by reference to the subject matter — that the words in the last portion of query ten, and the answer and the relative declaration, mean, *truly* or *untruly*, without regard to

dies, a *post mortem* examination is warranted, and if anything should be found that indicates an incipient latent disease, though

the knowledge of the party making the statement, and that if the party made the statement in ignorance, and in innocent ignorance of the existence of any disease tending to shorten life, it is nevertheless untrue in the sense of the contract, to the effect of vacating the policy, if such disease did *de facto* exist at the time; that is, that the warranty applies not merely to known diseases, or diseases of which in the circumstances, if the party was ignorant, he was not excusably so, but to latent diseases; and that if it shall ultimately turn out that the insured had a disease upon him [her] tending to shorten life, which, if it had been known at the time, might have prevented the contract being entered into, the policy is vacated, no matter how latent the disease may have been, no matter although the party's death proceeded from another cause altogether unconnected with it, (for the defender's plea goes that length,) it is enough that it existed at the date of the policy, although not apparent, by its effects upon the health, or discernible by any ordinary care or attention to the matter, or even by the most careful examination of persons of skill. To suppose that this is part of the basis of the contract would be to render the contract not one of certainty, and for insuring payment of a particular sum of money in the specified event, which is the real nature and object of the contract, but a contract of absolute uncertainty, on which no reliance can be placed that it will be productive of that for securing which it was entered into, the result depending upon certain facts beyond the reach of mortal ken, by which all the hopes and views of the insured may be irreparably defeated. The common rules of law and the warranty, without being so construed, appear to be quite sufficient for the protection of insurers: for it is always to be recollected that, although the warranty shall not be construed, as contended for by the defenders, it is still a question for the jury not merely whether the alleged ignorance of the party was actual, but whether, under all the circumstances, — including the duration of the disease, its mode of operation, and the interval of time between the issuing of the policy and the death — it was an ignorance without negligence, and which was entirely innocent and excusable. The plea of the defenders, therefore, humbly appears to the lord ordinary to be opposed to the whole scheme and purpose of such contracts, and to require for the insurers a protection which is not necessary in order to put them upon fair terms in adjusting the contract, and to afford which would relieve them from a risk which, consistently with the nature of the contract, ought to be run by them.

“The lord ordinary shall only add that if he has taken an erroneous view of the meaning of a warranty, expressed as in the contract of insurance in question, and the state of the law be as contended for by the defenders, then certainly the sooner it is promulgated the better, in order that parties insuring may be aware of the footing upon which their contract stands, and the grounds on which their claim may be successfully resisted, if the insurers shall act upon and enforce the contract, agreeably to their legal rights when they may chose to exercise them, uninfluenced by motives of liberality by which it is said they are generally guided.”

there were never any symptoms, and there is no insinuation of fraud or gross negligence, there is a breach of the warrandice, which voids the insurance. I can arrive at no such conclusion. Such a doctrine is not deducible from the strongest of the authorities. If a person is not guilty of any negligence in acquiring knowledge of his own condition, — if this is not established, there is no breach of warranty. It appears to me extravagant to maintain that an insurance may be voided upon an inquisitorial investigation into latent evils in the constitution of the party, who has no indication of disease at the time of the insurance ; upon a latent defect in the constitution, which, though not the cause of death, might have been. I am of the opinion expressed in the lord ordinary's note.

LORD MACKENZIE. This is not a case of ordinary absolute express warrandice like that of the right to an estate granted to a buyer of it. That has no dependence on the knowledge or *bona fides* of the party or his power of having such knowledge. The less the thing is, or can be known, the more necessary is the strict warrandice. But here the contract says nothing of warrandice or warranty. It only proceeds on a declaration, and stipulates, as a condition of the policy, that the declaration shall not be "fraudulent or untrue." Now I think the reasonable interpretation of these words must be "knowingly or blamably false." I think the very nature of a declaration is that it is true in the belief of the party, and was, as far as the party knew, or can know, not that it is absolutely true ; and that the after discovery of some latent fact respecting the matter cannot make the declaration be justly called a fraudulent or untrue declaration, or consequently void the contract. I think this the meaning that must be entertained by both parties in such a contract. For otherwise, I think no person would ever insure a life or take a declaration in such a contract. It would afford no safety — nothing like that assured provision which is the object of this contract. This is the stronger, because the failure of the condition here implies not only the loss of the policy, but the forfeiture of the premium : such a stipulation as that, for mere innocent error, I think, would really be a *pactum illicitum*.

LORD FULLERTON. The question which has been raised in these papers is one of great importance in its practical consequences ; but it certainly comes before us in a very inconvenient

form, viz., a discussion on the comparative merit of the issues proposed by the pursuers and defenders. And what increases the inconvenience is, that the mere adoption of either the one or the other would not settle the question on which the parties seek our decision.

The issues differ only in the additional words proposed to be inserted by the defenders in the counter issue: "Whether, on the part of the said Mrs. Armstrong, there was a breach of the conditions under which the said policy was granted?"

Now, these words would still leave the matter quite open; because the adoption of them would determine nothing as to the true legal import of the conditions in the policy, which is the main subject of dispute between the parties. Then I cannot help thinking that these expressions are quite superfluous, and form no necessary part of a counter issue, considering the nature of the point raised on the leading issue taken by the pursuers. After the admission of the terms of the policy, granted on certain conditions, it puts the question, whether the sum claimed under the contract be resting owing? Now, it appears to me that it requires no counter issue to enable the defenders to prove the violation or non-performance of the conditions of the contract. When a party founding on a contract or obligation, qualified by conditions, claims payment or performance, he must bring *prima facie* evidence at least, that the conditions have been observed; and surely his adversary would be entitled, without any counter issue, to negative the averment of their fulfilment.

The mere adoption, then, either of the one issue or the other, will leave undecided that point which we have here argued, and which it is most desirable to settle before the trial.

That question arises on the legal import and extent of the conditions contained in the proposal of insurance, and the declaration of the insured on the subject of her freedom from disease and general good health.

The tenth query in the proposal is, "Has the party a habitual cough or any disease, or symptom of disease?" Answer, "No." And the declaration of Mrs. Armstrong bears, that "I am now in good health, and do ordinarily enjoy good health." The pursuers hold these expressions to denote merely the good health of the declarant in the ordinary sense of the term; that is, freedom from any apparent sensible disease, or symptom of disease: while

the defenders maintain that these expressions amount to an absolute warranty, not only that she never felt herself to be affected with any complaint, or exhibited any symptom of complaint, but absolutely, that whether felt or not, no disease, in any form, existed in her constitution. This is a proposition rather startling, and it is necessary to examine, with some attention, the grounds on which it rests. It all turns on the meaning which, in such a contract, shall be attached to the term "good health." Does it mean external sensible health, and the absence of any external sensible symptom of ailment; or the total absence of any defect or disorder in the constitution, whether felt, rendered sensible, or not?

At the outset, let us inquire how far this construction of the words "good health," as denoting not the consciousness of good health but the absolute non-existence of any morbid affection in the system, derives any support from the tenor and evident import of the other disclosure and declaration which a party is called on to make. All the other questions in the proposal clearly relate to matters of external ailment, truly matters of fact on which the party can give or ought to be able to give, a decided answer, and on many of which other persons may give evidence. The evident object of all those questions is to procure for the insurers, before entering into the contract, all the information on the subject of the health of the insured which he himself possesses.

Then comes the declaration, that "I am now in good health, and that I have not withheld any material circumstance or information touching my past or present state of health or habits of life with which the directors ought to be made acquainted." The passage must be read together. Its object is to guard against concealment of everything essential, in so far as known to the party making the declaration. That is clearly the meaning of the latter member of the sentence; and, by the fairest construction, it serves to explain what goes before. But the defenders separate the two, and maintain that by the words "I am now in good health, and ordinarily enjoy good health," there is meant an absolute warranty against any disease, however latent; though not in the slightest degree affecting at the time the perfect feeling and conviction of health by the party. The defenders are loud in proclaiming their liberality in construction of the policy, but only on the points which do not happen to apply to the matter in dispute.

Let a fair, not to say a liberal construction, be applied to the terms "good health," on which the whole plea of the defenders is rested. It occurs in the description of the state of a living individual, — which state, in so far as evident to others, or perceptible by himself, can alone form the subject of description, — and when so employed, does it denote anything more than the absence of any ostensible, or known, or felt symptoms of disorder? Would any man, however scrupulous in the use of the terms, hesitate to declare himself on soul and conscience, in perfect health, so long as he felt himself in the perfect and healthy exercise of all the functions by which health could be tested; and was utterly unconscious of any derangement by which those functions were likely to be impeded? Or could it be, with any show of reason, charged against him as an untruth, because, for anything he knew, there might, by possibility, exist at the moment some hidden defect, or malformation, or morbid derangement, inoperative externally for the time, but sure, at some future period, to prove fatal? If this were requisite to justify the declaration of "good health," it is clear that such a declaration never could with certainty be made; and this goes far to settle the point in dispute. The point is the meaning of a term in a contract, and the term occurs in a declaration asked by one party and given by the other. Now, if in one sense of the term it admits of being declared in the negative or affirmative, and if in the other sense it never can be the subject of an affirmative or negative, can there be a doubt in which sense the term is used? But that is the very case here. If the term "good health" means the perfect, conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptom of ailment, the question may be asked and answered; but if the term is construed as meaning an absolute freedom from all defect or derangement, imperceptible as well as perceptible, the declaration is one which cannot be made, and which it would, therefore, be absurd to ask. And when the defenders represent it as a warranty, nothing is gained in the inquiry, because the question occurs, What is it which was warranted? "Good health;" and that just leads to the same inquiry in what sense that term was employed; for, it will be observed, there is here no express warranty by which a party may, and often does, take the risk of events or circumstances on which he possesses no present information. Here the warranty is

at best only implied from the term of a declaration, asked by one party and given by the other, and which is made part of the contract; and as the term is used in mere declaration, its sense must be determined by that which it evidently bears in the passage containing it. The provision, that the declaration shall form the basis of the contract, may be held to render the declaration equivalent to a warranty; but still the point, what is declared, and consequently what is warranted, depends on the construction of the declaration, and in choosing between the two senses of the disputed term — according to one of which a party may declare, while, according to the other, it would be absurd to ask and impossible to give a declaration — the former sense must, according to every rule of construction, be adopted.

Such appearing to me to be the obvious and necessary construction of the term “good health,” as used in the declaration of Mrs. Armstrong, I should require very clear and decisive authority indeed to compel me to take a different view; but I do not think there is any such authority. Indeed it rather appears to me that the *dicta* referred to on the part of the defenders have only an apparent relation to the point in dispute, and truly refer to a matter totally different. They all occur in the reports of cases, in which the insurances were effected by parties on the lives of others. Such was the case of Lord Mar, and such was the case of *Duckett v. Williams*, mainly relied on by the defenders. In those cases the question arose, whether the policy was voided by the untruth of the statements of health made or adopted by the party effecting the insurance, though such party made it in good faith, and was ignorant of the actual condition of the life forming the risk.

But those cases do not touch the present question. I do not see any question raised in them as to what should be the force of the term “good health” occurring in a declaration to that effect: but only whether the third party making the insurance was bound to warrant the truth of the declaration, which, it would appear, had turned out false.

We must take the *dicta* of those cases along with the circumstances to which they apply.

Thus in the case of *Duckett v. Williams*, Lord Lyndhurst states, in the passage quoted in the revised minute for the defender: “It was contended, on behalf of the plaintiffs, that the words must

mean truly or untruly, within the knowledge of the party making the statement, and that if the party insuring ignorantly and innocently makes a misstatement, he has not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue, because the party making it is not apprised of its untruth."

But it is evident that the whole force of the legal maxim ascribed to the learned lord, in its application to the present case, must depend on the particular ground on which he held the statement to be construed. If it could be shown that the representation of "good health" was held to be untrue, because the party, though to all appearance free from every symptom of disease, was found after death to have had some internal morbid affection, which had never manifested itself externally, that would be an authority in the present case. But there was no question of that kind raised there. The only question seems to have been, whether the life, described as a good one by the party effecting the insurance, was not truly a bad one in the ordinary sense of the term, and not in the new and critical sense maintained by the present defenders. This is evident from the other parts of the report, in which the question is described as one whether, at the time of making the insurance, it was truly an insurable life or not? Now, what does an insurable life mean but a life which is free from any of those symptoms of ailment, which would deter, in sound discretion, an office from taking the risk? The very term necessarily implies external and perceptible health, and nothing else. The question of insurable life or not never could, according to the reasoning of the defenders, be stated as a question of fact existing during the lifetime of the party. It never could be solved till her death had rendered the inquiry utterly nugatory. All that seems to have been decided, then, in the case of *Duckett v. Williams* was, that when one party makes an insurance on the life of another, representing his health as good, he will be held to warrant the truth of that statement, and will not be permitted to urge that he was ignorant of its untruth; and nothing more seems to have been determined in any of the other English cases alluded to.

Now that principle does not in the least affect the view which I have of the present case. It may be quite correct to lay it

down, as was done by Lord Lyndhurst, "that a statement is not the less untrue because the party making it is not apprised of its untruth." But, in my opinion, the statement in the declaration here was, in its sound construction, true, if the party making the declaration never had any consciousness of ailment, and never had exhibited any symptoms of ailment. According to the ordinary and only intelligible sense of the term in the circumstances in which it was used, she was in "good health," if she neither was conscious of, nor exhibited the slightest symptoms of disease.

While I think, then, that it is not of much importance which of the issues be adopted, I think it is of importance, that in whatever way the issue is framed, there should be an expression in the form of a specific finding of the opinion of the court, on the question argued in these minutes.

LORD JEFFREY. I concur in the whole views which have been delivered.

Life insurance is understood as a contract of indemnity against a risk; and it is therefore assumed that, in entering into it, the insurers proceed on a knowledge of facts sufficient to enable them to calculate the amount of the risk. It is incumbent on the insured to make a due and fair disclosure of all the facts experience has shown to be those on which averages may be calculated. But a party cannot be held to peril his insurance against risk upon the result of a fact unknown, and which could not be known to him. Nothing short of an act of parliament would induce me to put a different construction on such a contract. It is admitted that the term of the contract must be construed with a view to what the parties must have understood when they entered into it. Our institutional writers say, in needlessly strong language, that there is no equity in warranty. I think there are many cases where their words must be softened; but I pass over these and come to the meaning of "good health" in the warranty here. These words are used in their common sense. A person says he is in good health, because from his youth he has been strong and lusty; and because it turns out, upon *post mortem* examination, that there was the germ of some trouble, which, though it had never indicated itself by any symptom, might ultimately have shortened life, is it to be said that the statement is untrue?

"Untrue" has two meanings, a moral and a physical. In the

latter, a statement is untrue when the person is the victim of imposition. It is only untrue in the former sense, that will invalidate a policy of insurance, when the insured declares what he knows to be untrue, or might have known by due care and inquiry, or conceals the truth in the same manner. He declares that he has no disease, or *unease*. This must only mean, so far as he knows, or can possibly know. Let us bring this to a practical test. If the defenders' construction of the warranty be the true one, can they deny that it would be but fair to set forward its tenor accordingly? Now I shall like to see those offices that would, *de futuro*, insert their intention in their policies thus: Persons insuring in this office will please to take notice, that though they have always enjoyed good health, and the doctors on their examination could discover nothing amiss, still if at any future time it shall turn out that they had in them the germ of a disease of a serious nature, which, if known to the office at the time of insurance, would have made them hesitate to insure, the policy shall be void. If they are honest, they should put this in their policies; for it is proper for persons insuring to know that this is the state of the law. It is clear, that in the knowledge of this no one would ever insure. I think that is sufficient to determine the present question. The insurance company know they have no case. They brandish before our eyes a set of English cases, which I always approach with distrust. I was startled with the introduction of the word warranty, which, according to our notions, has nothing to do with the matter. Condition is the better word. After what Lord Fullerton has said, I shall not go into the cases. The view of the insurance company is, that the declaration of the insured is a counter insurance; that he gets insured on the one hand, but on the other insures against the risk arising from a thing unknown, and which could not be known. They construe his declaration as of this kind: "I positively declare that I have not in the interior of my skull, heart, or anywhere else, seeds of a fatal malady." To make such a declaration would be impious, and yet it is the only shape in which the guarantee contended for could be put. Marshall says that the insured should be careful to ascertain the truth of the fact. That implies that by due care the fact may be ascertained. Two remarks occur on the authorities: 1st, That there is no statement in any of them that undiscoverable maladies void insurance; 2d, That they

Stevenson v. Cotton.

have reference to third parties, who come forward and say that the life is a good insurable life. I hold the whole case to be made out, *a fortiori*, by that of Abraham,¹ before Lord Denman. There the jury found for the pursuer, because they thought that the deceased at the time of the insurance could not know of the malady. That is the last case, and appears to me conclusive on what I am surprised and grieved should be thought a point doubtful in this branch of the law. I agree with Lord Fullerton, that we ought not merely to approve or disapprove of the issue, but that we must not shrink from a positive decision of the point.

THE COURT pronounced the following interlocutor: "Find that whatever issues may be granted for trying this case, the proposal of Mrs. Armstrong, and declaration therein referred to, form the basis of the contract in the policy of insurance in question, and import a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease material to the risk, and that they do not import a warranty against any latent and imperceptible disease, that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time; and remit the case to the lord ordinary to proceed further as to him shall seem fit."

MRS. HARRIET STEVENSON or WHITE, pursuer; JAMES COTTON, defender.

(8 Court of Session Cases, 2d series, 872. 1846.)

Trust. Bankruptcy.—A party who was creditor of an insolvent, and who also acted in the character of his trustee in winding up his affairs and obtaining a settlement for him with his other creditors, effected in his own name an insurance upon the insolvent's life for a period of seven years. *Held*, in the circumstances, that the insurance had not been effected by him in his character of trustee, but that it had been effected at his own risk and expense, without the knowledge or authority of the insolvent, and that therefore the executor of the insolvent was not entitled to claim the sum in the policy upon its emerging by his death.

THE affairs of the late George White, tobacconist, in Edinburgh, became embarrassed in the year 1842. In September of that year, Mr. James Cotton, tobacconist, who was a creditor, (to the extent of about £40,) entered into an arrangement with

¹ *Swete v. Fairlie*, 6 Carr. & P. 1; *ante*, vol. 2, p. 244.

White for the purpose of obtaining for him a settlement with his creditors. The nature of the arrangement will appear in the course of the following detail of the circumstances of the case.

Mr. Cotton's interference in White's affairs, which was gratuitous, and undertaken apparently with a view to benefit White, seemed to have commenced June, 1842, when he endeavored, although unsuccessfully, to procure for White a loan on the security of some heritable property belonging to him. In the month of August, White came to the resolution of giving up business as a tobacconist, and disposing of the goods, &c., in his shop, which were his own property.

Upon the 19th September of the same year, an offer was addressed by Cotton to White and his wife of "£150 sterling for that shop and house, No. 10, Clerk Street, belonging to you," upon certain conditions which related to the term of entry, the payment of the current rent due by the tenants, the liability for the public burdens up to the term of entry, and the expense of the disposition in Cotton's favor. There was a further condition engrossed in the offer, to the effect that in case White might wish to resume and again carry on the tobacco trade in the shop, it should be in his power personally to "repurchase" the property before the expiry of three years, at the same price of £150, a partial payment of which sum was to entitle White to a personal possession of the shop, and the remainder was to stand over on the property for three years more, if required. In a letter, of date 22d of September, from George White to his brother William, in reference to a debt which he was owing to William, and also referring to a conference which had taken place the day before, between Cotton and William White, in reference to his affairs, the passage occurred: "In order to procure the sum offered to you, I am obliged to sell my property at a disadvantage, when I might have received rent till I should be enabled to redeem it, than from the produce of this sale." Of date 26th of September, a letter was addressed by George White to Cotton in these terms: "As I have given up all to you, as trustee on my estate, it is but reasonable to expect that you will give me a letter off your hand that you will call a meeting of my creditors, and let them agree along with yourself that they may share the proceeds and then grant me a discharge; as an honest man, I cannot think you would wish me to give my brother all, and

allow the rest to have nothing. I shall hand you a list of the debts I owe, and the names, so that you may consider what is best to be done, and if you shall consider it preferable that I appoint a man of business to wind up the concern, that would no doubt be the proper way for me, only I am desirous that no expenses should be incurred, as the funds will not afford extravagance; and if you shall give me a letter guaranteeing my discharge from all further trouble, I shall be satisfied, and then be ready to sign the disposition in your favor. Your answer will be obliging. I find the estate will produce about 13s. per pound, and I am left pennyless; and if I shall receive answer before Wednesday, I shall then call a meeting of my creditors at an early day."

This letter was answered by Cotton of date 28th October, in these terms:—

"According to your letter to me, of date 26th September, my best endeavors will be used to procure a discharge for you from those of your creditors, according to the list which you have furnished me with, and that at the rate of 10s. per pound, which appears the utmost your estate will yield. If security is demanded, I offer Mr. W. White, Dalkeith."

And of the same date, Cotton further wrote to White:—

"Mr. Stott will have told you of your brother's wish and my own to have the disposition now signed. If suitable to do so this forenoon, have the goodness to write a few lines to Mr. Crichton, which the bearer will take to him, you stating the hour suitable for yourselves."

The disposition to Cotton was accordingly executed on that day. This deed was signed by White, and also by his wife, for all right of life-rent competent to her over the subjects, and was absolute in its form, and bore to be in consideration of the sum £149 15s., which was stated to have been paid to White by Cotton.

Cotton therefore (it was averred by him) effected a settlement with all White's creditors.

It had been part of the agreement between White and Cotton, that the former should effect two policies of insurance upon his life for the sum of £75 each, one of which was to be deposited in the hands of William White, in security of the debt owing to him by George White. These policies were for the entire period

of White's life ; they were made out in White's own name, and they were effected at his expense, the premiums being paid out of his funds. The policies were effected in August, 1842.

In the course of the July previous, Mr. Cotton had effected an insurance upon White's life for the sum of £300. This insurance, which was made with the same office as the two policies for £75, (the Asylum Life Assurance Company of London,) was made out in Cotton's own name, and was for a period of seven years only, and the premiums were paid by Cotton himself. Shortly prior to this period, it appeared that Cotton had tendered himself as a cautioner for White in a loan which it was then in contemplation to raise for White's behoof, but which was not carried into effect.

In a document apparently drawn out as a view of the state of White's affairs about this time, the following entries occurred: There was charged against Mr. Cotton, (*inter alia*,) "price of shop, £150;" while, on the other hand, there was deducted from the charge against him the premiums paid by him, in respect of the two policies for £75, and a composition at the rate of 10s. per pound upon White's debts, which were stated at £291. This document was signed by White himself. No mention was made in it of any premiums for the policy of £300.

George White died in April, 1843, and Mr. Cotton received payment from the insurance office of the £300 contained in the policy.

Thereafter, an action was brought by Mrs. Harriet Stevenson or White, George White's widow, and his general disponent and executrix, against Mr. Cotton, in which she maintained that the heritable property abovementioned had been conveyed to Cotton only in trust, for the benefit of himself and the other creditors of George White, and claimed that it should be reconveyed to the pursuer (under deduction of the rents that had accrued) on his receiving payment of such advance as he might have made on White's behoof. And she further claimed the proceeds of the policy of insurance for £300, under deduction of the premiums paid for effecting the insurance.

It was averred by the pursuer, in reference to this policy of insurance, that it had been part of the agreement between White and the defender, Cotton, that the policy should be entered into; and that, in the event of White dying in the mean time, the

advances made by the defender in paying the composition, with the premiums of insurance paid by him, should be paid out of the sum in the policy; and that the defender should be bound to pay over the balance in his hands, if any, to White's heir or disponent; that the policy had been effected when Cotton was a creditor of White, and was kept up by payment of premiums when he was acting as trustee for him and his creditors, and at a time when he had funds and property in his hands belonging to White, more than sufficient to satisfy all his claims upon him (White), either in respect of his own debt or of the obligation he had undertaken to pay to White's creditors; and that the defender had no insurable interest in White's life, except as his creditor or trustee.

The defender, Mr. Cotton, on the other hand stated, — That the effecting of the £300 insurance was no part of the agreement between White and him, but was entirely a private transaction and adventure of his own. That he had been induced to interfere on behalf of White, and to make advances for the payment of his creditors, partly by the expectation that White, if relieved from his embarrassments, would still succeed in business; and partly by the fact that, in the course of a few years, White would succeed to a legacy of some value. That it was in these circumstances that he had effected the policy in question. That it had been done solely at his own expense, and without the authority or knowledge of White, at a period when he had no funds of White's in his hands; and the fact of its existence had become known to the pursuer by mere accident, in the course of inquiries which he had been making with regard to the other two policies above referred to.

It was pleaded by the pursuer, in reference to the heritable property, — That as the defender had received sums sufficient to reimburse him for the payments he had made to White's creditors, and the composition upon his own debt, he was bound to execute a habile and sufficient disposition in favor of the pursuer of the subjects in Clerk Street. With regard to the policy of insurance, the pursuer stated the following pleas: As the defender was, at the time of effecting the foresaid policy for £300 on George White's life, at least during its continuance and before it became exigible, trustee for George White and his creditors, and in possession of funds and property belonging to George White,

he must be presumed to have effected said policy for George White's behoof, and is now bound to communicate the benefit thereof to the pursuer as George White's executrix. As the defender was not, either at the time of effecting said policy, or at the time when it became exigible, a creditor of the said George White, to the amount of the said policy, he could not lawfully make for his own behoof, or take benefit by the said policy, and he is accountable for the amount to the pursuer as George White's executrix, deducting any debt truly due to him by George White. At all events, and viewing said policy as effected by the defender as a creditor of George White, he is bound to give credit for the amount, and to place the same in extinction of all his claims of debt against George White, either as an individual or as trustee under said arrangement.

The defender pleaded in reference to the heritable property, — That the transaction by which he had acquired the property was an absolute sale, and that it had not been conveyed to him in trust for behoof of White and his creditors.

In reference to the policy of insurance, he pleaded, — That the policy had not been effected by him in the character of White's trustee. The policy had been negotiated and effected in the months of June and July, while the arrangement as to his acting as trustee had not been entered into till the month of September subsequent. At this period the defender was merely a creditor upon White's estate. It had been effected by the defender at his own expense and risk, and as a private transaction of his own; and, so far as appeared from the evidence, without White's having been even privy to its existence. It was not a good objection to the defender's right to the sum in the policy to say, that he could not lawfully effect an insurance on White's life for £300, in respect he was not at that time a creditor of White to that amount. The liabilities which the defender had undertaken for White gave him a good insurable interest in his life to that extent. But besides this, the plea, although it might have been competent to the insurance office, as the parties to the contract of indemnity, was *jus tertii* to the pursuer. A creditor effecting an insurance for his own security, at his own risk and expense, and with the view of benefiting himself alone, was not bound to communicate the benefit of it to his debtor. The debtor could have no right or interest in the private securities which the creditor

might think proper to take for his own protection ; nor was there any equitable rule in law, in virtue of which the creditor could be compelled to cede to him the benefit of these securities after the debt had been satisfied.

The defender further stated, that although he considered that he was entitled, besides drawing the sum in the policy, to demand payment of his debt (or a composition upon it) from White's estate, he did not mean to insist for payment of the debt, restricting his claim to the sum in the policy.

The lord ordinary pronounced this interlocutor : Finds, first, that the defender held the property conveyed to him by the disposition of the late George White, dated 28th October, 1842, in trust for him and his creditors, and that he, the defender, is bound to account for the same accordingly. Finds, secondly, that previous to obtaining or applying for the insurance of £300 on the life of the said George White, the defender was acting confidentially in his affairs for his behoof, and that the policy for that sum, though taken in name of the defender, was truly made for the purpose of securing or covering any advances or responsibilities which he, the defender, might make or undertake for the said George White, and that the defender is also bound to account for the proceeds of that policy, under deduction of such advances, or debts due to him, by George White. Finds, that the defender in accounting for the estate of the said George White, is not entitled to take credit for the amount of the three bills of £49 15s. 6d., £75 2s. 6d., and £49 12s. 6d., claimed by him ; and, of new, remits to Mr. George A. Esson, accountant, to apply these findings, and to make up a state of the balance betwixt the parties, and to report.”¹

Cotton reclaimed.

¹ The report by Mr. Esson, the accountant, states the correspondence and other circumstances connected with the disposition of the property which belonged to White and the pursuer, in favor of the defender so clearly, that the lord ordinary considered any observation in that matter unnecessary. The policy of insurance to the extent of £300 on White's life, effected by the defender, stands on a somewhat different footing. It appears that, as early as the month of June, 1842, if not before that period, the defender was intrusted by the late George White with the arrangement of his affairs, and authorized by him to employ solicitors, and other men of business, to effect loans for him, and agreed to be cautioner for those loans. The accountant has referred to his employment of Mr. Moffat, as a solicitor for Mr. White, in order to effect a

Stevenson v. Cotton.

Lord Justice CLERK. Having the misfortune to differ from the lord ordinary in the view he takes of the two leading points decided by the interlocutor, I feel anxious to explain fully the grounds of my opinion, and the more so, as the case is one of some delicacy. Whenever a party appears to be impressed with the character of trustee, to any extent whatever, there is always

loan for White's behoof. This account was rendered to Cotton, and is addressed to him, who was then clearly acting for White; and there are charges of the 16th and 20th of June, and it is stated in one of them that you (the defender) named yourself and Mr. Johnston as the cautioners under the loan. The defender was, therefore, confidentially acting for Mr. White, and tendered himself as cautioner, prior to the period when this insurance was effected. The correspondence with regard to it began before the end of the month. On the 29th of the month, there is a letter from Mr. Hugh Fraser, then acting for the Asylum Life Assurance Company, but now agent for the defender, to Mr. Johnston, (whom the defender had tendered along with himself as a cautioner,) in answer to one inclosing a certificate for Mr. White, in which he says: "I now beg to inclose you a note to Dr. Thomson, our medical referee, which Mr. White may please deliver at his convenience, and the doctor will send me his certificate without delay." The regular inquiries having been thus made by the company with regard to White's health, (with White's aid,) the insurance was agreed to on 14th July by the directors of the company. The negotiation for this assurance appears, therefore, to have commenced within nine days after the defender had tendered himself as cautioner for a loan to White, and he continued to act confidentially in these affairs, and to negotiate with White's creditors. While the defender was in the course of exposing himself to responsibilities as cautioner or otherwise for White, it was an obvious and proper precaution to insure White's life; but having acted in that character, and undertaken the arrangement of White's affairs, he is not entitled to place himself in a different position, and maintain, contrary to what appears to have been the true nature of the transaction, that he was insuring White's life as a speculation for his own peculiar benefit, and not with a view to his security in the course of the arrangements which he was making. As the defender had the whole management of the business, he could take the policies in his own name, or White's, as he chose. He very properly took the first in his own name in order to provide a fund under his own control for his security, in the event of his incurring loss or hazard for his friend. He directed the two subsequent policies, both of which he has now given up, to be made out in White's name, having previously amply provided for any risk which he was likely to subject himself to by the first policy. The defender has not thought proper to produce any entries in his own or Mr. Johnston's books referring to this insurance as his own private speculation and transaction, and from the facts both antecedent and subsequent, the presumption is that he was acting for behoof of George White, the pursuer's husband, securing himself from loss at the same time. — REP.

a great jealousy justly entertained of any plea or claim which seems to tend to that party's own benefit; and that jealousy applies with peculiar force to a case in which the party's interference and actings as a trustee arise in consequence of the difficulties and embarrassments of the individual of whose affairs he had any management. The case therefore requires to be very carefully and minutely examined.

It is to be kept in view, however, that the defender, Cotton, does not deny his liability to account, or that he was acting for certain purposes as a trustee; but he contends that he acted upon a certain fixed arrangement, highly advantageous to the alleged trustee, White — under which he, Cotton, undertook very heavy responsibilities, and had no claim of relief in the event of the funds he received being inadequate for his reimbursement.

The first question relates to the shop. The disposition to the same is absolute, and for a fixed price. Now, I think it is a most important matter that on the record it is nowhere averred that this was an inadequate and unfair value for the shop. The mere use of the term "nominal price," in the record, does not, as was indeed candidly admitted, cover any such averment, being employed to explain the fact that the price was not paid down at the time, but was to be employed, in the first instance, so far as necessary, in settling with the creditors of White. It may be that shop property has recently risen in Edinburgh, or that the pursuer wishes to get back the shop, or hopes by so shaping her claim to obtain, if she succeeds, something more from the defender than the price stated in the disposition. But on the record it is not averred that that sum was an inadequate and wholly insufficient price. On the contrary, in the record, § 11, p. 5, in stating her claims articulately and distinctly against the defender, the pursuer, the widow and executrix of White, says expressly, that the sums which the defender has received, and is accountable for to the pursuer, are the following: 1. "Value of property in Clerk Street, £150." Of course this sum was only due on the footing that the house was really sold at that price. There is no claim on the record for reconveyance, as the summons sets forth; on the contrary, the above claim is inconsistent with such a view, and is the only claim stated on the record.

Further, the record is very full and special. The pleas in law,

on the other hand, are indeed quite inconsistent with this statement of the claim. But assuming that the claim for reconveyance was not waived, then this only gives more importance to the absence of any averment that the price stated was not an adequate and fair price.

There was, we see, in the letter of 19th September, 1842, a distinct offer to buy the property in Clerk Street for £150, the sum stated in the disposition, drawn out a month afterwards, and in a letter of the 22d September to his brother, which distinctly speaks of a sale, as the plan he had in view, or had even adopted. Then on the 26th, he speaks of the arrangement as completed, although he requires a certain guarantee for his satisfaction before he signs any conveyance. Along with that letter a list of his debts was sent, bearing date 26th September. To that list so sent to the defender, is appended a note signed by a mutual friend, Stott. "The above is the exact list of debts Mr. Cotton is bound to pay, and none else, as attached by Mr. and Mrs. White. J. Stott." The answer was sent on 28th October, obviously after signing. I have carefully considered that letter, with the list of debts, and the answer of the 28th October, and the result on my mind is this: that on condition of getting the house for £150, and receiving the shop goods and furnishings, the defender undertook and became bound, having received a list of the debts, to pay off or settle the same, and to procure a discharge from all the creditors. One object of the deceased clearly was, to prevent his brother drawing full payment, which would have dissatisfied his other creditors.

I think the defender clearly undertook this obligation, and was trustee on that very special and onerous footing. He could not have drawn back, on the ground that the house turned out of less value than £150, and that he had been obliged to sell it, and could get £100 or £80 for it. I think he was bound to pay off the debts, whether he lost by the arrangement or not, unless he could show that there had been gross deception practised on him as to the amount or number of the debts. I think against an action to have it found that he must relieve the deceased of the specified debts, or concluding for payment of the balance of the price, he could have had no defence, either on the ground that he had lost by the arrangement, or that the debts exceeded the value of the house, and that he took the house only *valeat quantum*, and

now offered it back. That the transaction was a peculiar one ; that it was entered into when White was in difficulties, and is to be looked at with jealousy, is true. But on that very account the defender would have been bound to implement the arrangement according to its true spirit and intendment ; and I am of opinion, that he was clearly bound by the guarantee to free and relieve White of all his debts, and to account for £150 as the value of the house. It must be kept in view, that these letters are founded on as the evidence, and only direct evidence, of the trust, whatever that trust or arrangement was. We must then give effect to the agreement as to both parties ; to the counterpart, as well as to the obligations undertaken by the defender. We are not in a reduction of the agreement as unfair or impetrated by undue advantage being taken of White, when in difficulties, by the defender. That is not the nature of this action ; and it is very material to keep that in view, for the argument of the pursuer at times confounded these matters. The pursuer herself founds on these letters, and on the agreement and arrangement, which, she says, they establish. She must do so, if she wishes to establish a trust, and she calls the defender to account as trustee, under the arrangement said to be thereby proved. The transaction itself is not sought to be set aside ; quite the reverse. Then we are to construe these letters in order to see what was the obligation undertaken by the defender, and on what footing he undertook to enter into such obligation. I think it very clear, that he undertook to pay off debts, and obtain a discharge for White, buying the house at £150, whether it fell in value or not, applying the money to payment of the debts, and liable for the surplus, if there was any. He might have lost considerable by that transaction ; he cannot gain, except in so far as the house may be now worth more than the price of £150 ; at the time it is not alleged to have been so. Now the pursuer admits, and indeed pleads, that whatever is the arrangement and trust truly constituted by these letters, is to be enforced : that is her case ; she is not attempting to set aside the transaction, and apparently would have no ground for doing so. On the contrary, she asks us to enforce it. That both parties hoped that the debts would be settled for 10s. a pound is clear ; but if it had been necessary to pay more, I think the defender must have borne the difference and the loss. There is another and separate piece of evidence of

great importance, which I shall notice afterwards, as it bears equally on the next question in the cause.

I must further observe, that the pursuer does not, and cannot, represent the defender to be an ordinary trustee to pay creditors. On the contrary she expressly states, that he took on himself the debts at 10s. in the pound, and was bound to settle them, at the utmost, at that rate. But if he undertook such an obligation, the question at once arises, in respect of what consideration? And it plainly appears that it was so arranged as a condition of the sale of the house. The pursuer's averment is on p. 2, § 3, and of itself shows that the defender, on his own showing, was not an ordinary trustee.

The second point in the cause turns on a question of much interest and nicety, although we are saved the necessity of determining the part of the question which would have been of the greatest general application. Mr. Cotton effected an insurance for £300 on the life of Mr. White, some time before the conveyance of the heritable property, and before he undertook the duty of trustee of winding up White's affairs and paying the debts. The origin of that insurance is not very well cleared up. It is said to have been entered into because White had, about the same time, hoped to raise a loan on his property, and that the defender had agreed to become his cautioner, and so had made the insurance for his own protection. If this was the case, I do not think it aids the pursuer's plea, for on the supposition so stated, it is clear that the insurance in that case would have been a precautionary measure by the defender for his own relief and protection, of common occurrence, and perfectly familiar to all, as often taken by friends so interposing their credit for another one, and taken at their own expense. And, on that view, the premiums must have been paid by Cotton himself, unless White had specially undertaken to bear the expense of his obtaining such an insurance. On the above supposition, White's executrix could have had no claim whatever for the sum due under the policy. That is clear. Then, was the character of the insurance, and the right to the policy, ever altered, and did White ever agree, when the loan did not go forward, that the premium for this policy should be paid by himself, or what was the same thing, paid out of his own funds in the hands of the defender? White could have had no benefit personally by any such arrangement, though his

executrix might ; it would have been a benefit, *pro tanto*, to the defender at the expense of White. Is there any evidence whatever that White became bound to pay the premiums on this insurance, and that the defenders could have charged them as payments out of the small trust funds in his hands? I find no evidence of this at all ; and nothing whatever that even renders such an arrangement at all probable as between the parties. On the contrary, it seems to me the most unlikely in the world to have been agreed to by White in the circumstances. And here I must observe, that I do not very well understand what case the pursuer means to state, or what view distinctly she takes of the defender's situation. She calls him a trustee, and desires us to view him as such. If an ordinary trustee, then the defender ran no risk at all. He was only to apply the funds and property, so far as they would go, in payment of debts, and could not be called on, in any result, for more than the amount of the property. But on that supposition, which seems at times to be the pursuer's view in argument, as the defender ran no risk, so he required no insurance for his protection at all. This, then, would not explain the policy being in his name. If said to be entered into before this trust arrangement, but made part of it, then one would expect to find it specially alluded to in the letters relative to the condition of the trust as a fund of credit or payment, and as a matter to be kept up out of the property. It is not noticed. If, again, the pursuer admits that the defender was not a common trustee, but did run certain risks, and undertook specifically a certain obligation or guarantee in favor of the deceased, viz. : to clear him of his debts, without reference to the relative amount of the same and of the property, then, as soon as such an admission is made, the defender had an interest of his own to protect by the insurance, and the burden of the premiums was his personal concern. On the other hand, that view of his situation, which is the true one, and is admitted on record, excludes the notion that White was, by having the burden of the policy, to relieve him of that very risk. It is said by the pursuer that White knew of this policy for £300 ; and probably he did know that some insurance was effected by Cotton, although there is no proper evidence that he knew of its amount. But if White is to be taken as in the knowledge of this insurance, what should we then expect to be the result, according to the view of the pursuer,

and on the supposition that White had the interest in this policy? Why, that the policy would have been noticed in the letters of September, and still more, that White would have regarded it and treated it as his policy. The reverse appears to have been the case. Other two policies were entered into shortly after, which were distinctly for White's behoof, directly or indirectly, and the premiums of which he was to pay. These were made out in White's own name. But the important, and to my mind conclusive, evidence on the whole of this matter, as well as on the first point in the case, is afforded by a regular view of his affairs, drawn up in a very business-like style and manner, apparently with assistance, and signed by White himself. The history of that paper we have not, and I should have liked to see the account given by Mr. Pridie, who, I have no doubt, knew of the document. But it is produced and founded on by the pursuer, in order to show the amount of the small movable effects handed over to the defender. That paper states in detail the value of the movable property, then enters "price of shop," summing the whole up as the amount of charge against the defender; then it deducts the sums paid for the two assurance policies taken in White's own name, without the least notice of the premium on the £300 policy, and deducts the amount of the composition of 10s. on the sum total of debts specified in the list sent to the defender by Mr. Stott; then it charges the defender with the balance, and grants authority to a solicitor, Mr. Pridie, to uplift the same as the "balance of my estate."

Upon the first point in the case this paper proves: 1. That the shop was sold according to Mr. White's own understanding; 2. Sold absolutely for £150, and that sum was held to be due by the defender, as the price of the same; 3. That the defender was bound to relieve him of all debts assumed to be taken at 10s. as a composition; while, in point of fact, the pursuer gets a more favorable settlement, for, as many creditors have settled for less, or not claimed, she gets a larger balance.

But, on the second point, this paper also demonstrates to my mind, that the policy for £300 was entirely the defender's own concern; and that Mr. White did not understand that he could be charged with the payment of the premium, or remained under any burden for the same to the defender. I take it that he knew that some policy had been effected by Mr. White. The pursuer

has averred, § 5 of report, p. , that the policy was effected as part of the agreement entered into in September and October. That is clearly erroneous. But I assume that Mr. White found that there had been some such policy, for he was examined on the part of the office, and answered the questions put to him as to the same. But then such knowledge only gives greater weight to the evidence afforded by the fact, that in the state of his affairs he holds himself as in right of the two small policies, and allows deduction for the premiums on the same, but omits all notice of the larger; and accordingly on his death, his widow, and those acting for her, were in entire ignorance of the existence even of this policy.

I have not alluded to the evidence as to the proposal for the policy, for I think it too clear to admit of dispute that the proposal was in the name and for behoof of Mr. Cotton, as the party interested.

According to the view now stated, I am clearly of opinion that the defender did not hold the policy in trust.

But then if not held in trust, on what ground can the executrix claim the benefit of the policy?

The separate point, whether, to the extent of the debt, the defender must pay himself out of the policy, although he alone paid the premiums, and is not both to get payment out of the estate and the full sum recovered under the policy, we are not called on to decide, as the defender is willing to allow that sum to be held as paid out of the policy, and not to state it against the estate. I reserve, therefore, my opinion entirely on that important and nice question, until it comes before the court for decision.

But to the benefit of the policy generally — to the surplus *ultra* of the payment of the debt — on what footing does the claim rest? It is not shown that Mr. White ever consented to the defender obtaining any such policy at his expense, or that he (Mr. White) became liable to the defender to pay the premiums. Again it was a short policy — for seven years; so that if Mr. White had survived, neither he nor his representatives could have had any benefit from such a policy, and they would have had to bear, on the pursuer's theory, the whole loss of the premiums. How could the defender have enforced payment of the premiums from Mr. White? I see no ground whatever on which he could

have done so. There is not an expression in any one of the letters which could support a claim by Cotton against White to pay the premiums on this policy. Again the state of affairs, already referred to, shows that Mr. White well knew that with this policy he had no interest or concern whatever, in any view. Clear it is that before White's executrix can claim the sum in the policy, we must see grounds on which White could have been subjected in payment of the premiums. I am therefore of opinion that such a claim cannot be sustained.

We need not enter into the inquiry, whether the defender had at the time an insurable interest or not; that was the concern of the insurance office. I presume they made their inquiries, for we see from the letters that they were fully aware of this question between the defender and the widow.

LORD MEDWYN. The first point brought before us in this reclaiming note is as to the shop, whether it was acquired by the reclamer by purchase, at the price of £150.

When one acts as trustee for another, the acquisition of any portion of the trustee's property by the trustee, for his own behoof, is so often attended with circumstances of suspicion, perhaps of unfair dealing with a man in difficulties, and such a transaction is always to be viewed with so much jealousy, that I do not wonder at the view taken of this case by the lord ordinary; but, upon the whole, I am not inclined to concur in this. I do not see it anywhere stated in the record that £150 was an inadequate price for the shop, that it had been given away at an under value; and when I consider the absolute disposition at this price, and couple it with the inventory of stock subscribed by Mr. White himself, which was produced by the pursuer, and is founded on in the condescendence, I cannot help thinking it proves very distinctly Mr. White's own idea of the terms on which the defender undertook the office of trustee. The sum of £150 is set down as "the price of the shop," for which he was to account, corroborating the statement in the disposition. And I think this view quite consistent with the correspondence. At first he had contemplated a loan of £200, in which the defender was to be a cautioner; then, on 19th September, the defender offers to purchase the shop and house for £150, with power to White to redeem in three years. It does not appear that at this time it was contemplated that the defender was to act as trustee. But

neither this loan, nor the sale by itself, would have enabled White to get rid of his debts, which amounted at this time to £291; and therefore a new treaty seems to have been entered into, by which the defender was to do his best to get the creditors to accept 10s. per pound, and to pay them this composition. So far he was trustee on his estate, not, however, an ordinary trustee; and the statement already referred to showed that £150 would just about pay this composition, which sum, accordingly, I think he undertook to pay as the price of the shop. On his undertaking to settle with the creditors, which he did by the letter of 28th October, the disposition is accordingly signed, but not till then. True, the sum though discharged was not paid over to White, but this is quite consistent with his character as trustee; for it was the defender who was, as his trustee, to pay it to the creditors, and it depended entirely on the settlement he should make with them how much would be required for that purpose. It would appear that he has been very successful, so that a much larger sum will be handed over to the pursuer than was claimed under the state and order of payment in favor of Mr. Pridie.

With regard to the insurance of £300 for seven years on Mr. White's life, I think it very clear that it was a private transaction for the defender's own behoof. It was effected 8th July, 1842; the two policies for £75 were on the 27th. Now, in the state I alluded to before, Mr. White sets down the premium of the last as a charge against himself, but he says nothing about the prior one for the £300. Yet, if this had been in the trust affairs, this would have been a debt by White as much as the other. No doubt the defender's debt at this time, due by White, amounted only to about £40; and as there is no appearance of any intention at this time of his acting as trustee, which seems to have been proposed and agreed to between the 19th and 26th September thereafter, it may be considered singular that he should have thought of insuring so large a sum as £300, to which amount he certainly had no insurable interest. But we must recollect, that it was very shortly before this that he had offered himself as cautioner for a loan for £200. The treaty may have been still going on, and he may have thought it would still take effect, when the proposal to the office was made on 2d July, (the last entry in Moffat's account about the loan being 20th June;) and this seems to be confirmed by the terms of that proposal, begging

an early answer, as a cash transaction is depending on it. The explanation given at the bar, that it was in relation to an expected legacy, did not, I must own, satisfy my mind, as the state left the debt due only to amount to £40, and did not warrant an insurance to the extent of £300. I do not mean to say that this excess voids the policy in a question with the defender, more especially if the office pays it without inquiry; but it strikes me as an important element in the inquiry, whether it was for the benefit of White, or of the defender, that he had the prospect of an insurable interest beyond the sum of £40, the debt then due. Now then, I think that although a creditor, having insured for his own benefit, recovers from the insurance company more than pays his debt, this does not free the debtor from the obligation to pay his own debt; and further, I think that there is no claim upon the creditor to make over the benefit of the policy to the debtor. At all events, it is not necessary to decide how far, in such a case, the debtor is bound to pay a debt already paid by the insurance; and therefore I do not hold myself by the opinion which I now hold, as it was admitted that the defender would not claim the composition on his own debt, amounting to £21 6s. 10d., against the widow, and, of course, she will get the benefit of this; but I do not see that she is entitled to any other benefit from this insurance, effected by and paid for by the defender alone, and for his own benefit. By the accident of White's early death, it has turned out a very advantageous insurance; had he survived seven years, it would have been quite the reverse.

Lord MONCREIFF. There are here two points for judgment, both of which the lord ordinary has decided in favor of Mrs. White.

1. Whether the disposition of the shop in question is to be considered as a trust in the person of the defender, so as to render him liable to the claim now made for a reconveyance of the property, or to account for the value of it as in a trust? and, 2. Whether the policy of insurance for £300, effected by the defender in his own name, belongs to himself, or whether it must be considered as made for the behoof of the deceased George White, and the proceeds accounted for to his estate, under payment of the defender's advances, and the debts due to him?

I think that both these points are attended with difficulty;

and I regret that at present I cannot concur in the interlocutor upon either of them.

1. The disposition of the shop is absolute in its terms as for a sale for a price of £150. Whether the statute as to the proof of trust may strictly apply to such a case or not, it is evident that, where a disposition, absolute in its terms, has been granted, the presumption must be that it was meant to effect that which it professes to do, and that it must be incumbent on the party who says that it was intended to constitute a trust only, to make it very clear that that was its real character, notwithstanding the form in which it is expressed.

The opinion of the accountant who had examined all the documents, followed by that of the lord ordinary, is entitled to much consideration. But still we are bound to look into the facts; and with the best attention I can give to them, I am not able to say that there is any sufficient evidence that the disposition did not mean what it expresses, a sale of the shop at the price of £150.

A distinction must be attended to in order to understand some of the expressions in the correspondence. Supposing this to have been a sale in respect of the right given to the defender, there was a trust of a certain order for obtaining a settlement with the pursuer's creditors, and a discharge to him. But this is perfectly consistent with the fact of the defender agreeing to take the property as a sale to himself, and to pay or account for the price of £150.

The pursuer undertakes to prove that the transaction was really a trust, by the correspondence previous to the execution of the disposition. I think that she is not successful in this undertaking. The proposal made by the defender's letter of the 19th September, 1842, is distinctly for a sale and purchase, and nothing else, with a reserved power to White personally "to repurchase" the property before the expiry of three years, at the same price of £150. There is no letter simply accepting of this. But independent of anything else, the disposition granted in absolute terms, nine days afterwards, must surely be taken as legal evidence that it was accepted. But it seems to me that the intervening facts show that it was accepted, and that it was a sale, and nothing else, that was to take place. On the 22d September, three days after the offer, George White, in a private letter to his brother, who was his creditor, uses these words: "In order to

procure the sum offered to you, I am obliged to sell my property at a disadvantage." Then he writes to the defender, on the 26th September, requiring some obligation from the defender to transact with the creditors, and obtain a discharge for him; and then he adds: "If you shall give me a letter, guaranteeing my discharge from all further trouble, I shall be satisfied, and then be ready to sign the disposition in your favor." If the disposition was intended as a mere trust, what sense could there be in asking the defender to guarantee a discharge of the creditors? In the beginning of that letter, Mr. White, no doubt, uses the expression, "As I have given up all to you, as trustee on my estate," &c. But the meaning of that expression is explained by the remainder of the letter, in the expectation entertained that the defender would undertake to settle with the creditors, and guarantee a discharge from them. The defender answered on the 28th October: "According to your letter to me of the 26th September, my best endeavors will be used to procure a discharge for you from those of your creditors, according to the list which you have furnished," &c.; and he, rather singularly, adds, "If security is demanded, I offer Mr. W. White." I can find nothing in this letter which indicates that he was to take the disposition as a trust only, nor are the terms of it even reconcilable with that idea. But the disposition, in absolute terms, was signed that very day.

In all this I can see no trace of evidence to convert the deed of sale into a deed of trust. But there has been further exhibited a document, called "Excerpt of Inventory of George White," which appears to have been made up by himself, in which he has set down expressly, "Price of shop, £150." This being admitted to be a writing made up by the authority of Mr. White himself, and signed by him, it is difficult to see how the pursuer can maintain, in the face of it, that the shop had not been sold for a price, but conveyed in trust only.

On the whole matter, therefore, I must be of opinion, that the property was not conveyed to the defender as a trust, but was sold to him for a definite price.

2. The second question is, Whether the policy of insurance, effected by the defender in his own name on the life of Mr. White for seven years, belonged to himself, or must be accounted for to White's representatives.

But for the opinion of the lord ordinary, I should think that there was little or no difficulty in this question. Two insurances were made on Mr. White's life in his own name; and on these, of course, his representatives were entitled to recover the sums insured. But the policy in question, whether it was known to Mr. White or not, was altogether different, and was effected by the defender at his own hand, on his own account, and at his own risk. Seeing that he was about to be involved in the affairs of George White, and being altogether uncertain what might be the result to himself, he thought it a prudent measure, for his own safety, to insure White's life for seven years for a sum of £300, sufficient to cover any contingency. I apprehend that he was perfectly well entitled to do so, notwithstanding that he had agreed to act confidentially, in endeavoring to effect a settlement between White and his creditors. He took nothing, and asked nothing, from White's estate. He paid the premium himself, and never charged it against White, and it is not stated in the paper of stock, already alluded to, made up by White, though the premiums on the other policies are there entered. It is, I believe, a very common transaction. A factor or other person has involved accounts, the settlement of which may depend on his constituent's survivance for a certain time. Is there anything to hinder him from insuring his constituent's life for that term? Or still more, any law by which the proceeds of such an insurance shall belong to the representatives of the party dying before the fixed period?

It is very true that a question of a different kind is sometimes involved in such a transaction. The law does not encourage mere wagers on life; on the contrary, this is prohibited by statute. An insurance company are therefore entitled to require a party proposing such an insurance to show his interest in effecting it, and are not bound to pay on the policy, though granted beyond the interest which can be shown to have existed. But if the insurance company is satisfied on this head, and makes no objection to pay the sum insured to the party who alone can claim it, no other party can have any right to interfere.

But in the present case I have thought from the beginning that there was a strong peculiarity in the nature of this insurance. It was not an insurance on the life of George White absolutely, but an insurance on his life for seven years only. To effect it, it

was necessary to pay premium ; and to keep it up, it would have been necessary to pay premium in six or seven successive years. But if George White had survived the seven years, which, according to the medical certificate obtained at the time, was very probable, the defender would have lost all the premiums paid, and never could have stated them against White's estate, and he would have recovered nothing under the policy. The whole transaction would have been a dead loss to him. But what justice would there be in saying that he who had paid all the premiums, and undergone all the risk, should be deprived of the benefit, and that that should go to White's representatives, who had nothing to do with it, and who would have lost nothing if the event had never occurred.

In short I cannot enter into the reasoning of the lord ordinary on this point, and I do not see any authority on which it can stand.

LORD COCKBURN. I am of opinion that the interlocutor ought to be altered.

First, as to the house. The defender has an absolute disposition to it, which bears to have been granted in consideration of a price, of which the receipt is acknowledged. It is certainly competent to the pursuer to prove, notwithstanding this, that the property was only given in trust. But she can only do this by the writ or the oath of the defender. I see no such evidence. We have no oath, and I think we have no such writ.

The only material document referred to is the letter from the pursuer's deceased husband, of 26th September, 1842, which begins by saying, "As I have given up all to you as trustee on my estate," &c. It is enough to dispose of this, that it is not the writ of the defender. But, moreover, the expression, "to you as trustee," is exceedingly equivocal ; because it is quite possible that an absolute disposition to a property may be made the condition of a person's agreeing to act as trustee. Accordingly, all that the letter, in its substance, bears is, that the defender should guarantee that the writer shall obtain a discharge from his creditors. "And if you shall give me a letter, guaranteeing my discharge from all further trouble, I shall be satisfied, and then be ready to sign the disposition in your favor." The defender's answer does not agree to give any absolute guarantee. Putting what he understood to be the real meaning on White's letter, he says: "Ac-

according to your letter, of date 26th September, my best endeavors will be used to procure a discharge for you from those of your creditors, according to the list you have furnished me with, &c. ; if security is demanded, I offer Mr. W. White, Dalkeith." If the pursuer's husband had been dissatisfied with this "best endeavor," he need not have desponed the shop. But after getting this offer from the defender, he subscribed and delivered the absolute and irredeemable disposition. And in doing so he made a very good bargain ; because the debts, according to the state that was made out of what the defender had to pay, amounted to £291 2s. 8d., while the property, including the shop, was only valued at £195. This left a balance of £44 8s. 9d., which George White, by an order signed by him, directed the defender to pay to his solicitor. One of the articles by which this writing is preceded is, "Price of shop £150 ;" plainly implying that, instead of being held in trust, and to be accounted for, the shop had, as the disposition bears, been sold to the defender. There are other circumstances, all of the same tendency.

Even if a trust, therefore, could be proved by facts and circumstances, I should think that there are no facts or circumstances to rear it up here ; but if all evidence, except the writ or oath of the defender, be rejected, there is no evidence whatever.

Secondly, as to the insurance. The defender is willing to take payment of his debt out of it ; but the pursuer insists that, besides this, he shall give up the surplus. I see no ground for this.

It is averred by the pursuer on the record, that the effecting of this insurance by the defender was the result of a positive agreement between the parties ; and that under this agreement, the £300 insured, if recovered, was to be accounted for. This is denied ; and as there is confessedly no proof of it whatever, the statement must be left entirely out of view. In this situation, the obligation to account rests on the principles involved in the pursuer's sixth and seventh pleas.

One of these is, that the defender being trustee for George White and his creditors at the time of effecting the insurance, is under a legal obligation to account for the sum recovered. Even if this principle were sound, it would be obviated by what I hold to be the fact, viz., that the defender was not a trustee, especially when this policy was obtained in July, 1842.

The other principle is, that an implied obligation to account

arises out of the circumstance that the defender, though a creditor, was not a creditor to the extent of the sum insured ; but I hold this objection not to be maintainable by the pursuer. Whatever the assurers might have said to a person insuring beyond his interest, they have paid. I do not think that a legal obligation to account can be deduced from an excess of the insurance above the interest (assuming such excess to exist) by the pursuer. But, besides, I do not admit the excess. It is true that the defender's original debt did not amount to £300 ; but he could not tell what the exact result of his connection with George White might ultimately be, especially since it is unquestionable that he could not (as he did not) debit White with the premiums. If White had survived the seven years insured, the transaction would have been much against the defender.

It is said that no creditor can ever insure his debtor's life, except under an obligation to communicate any balance that may be over after paying his debt to the debtor or his representatives. I know no authority for this notion. Certainly none of the cases referred to imply it. Where a creditor merely insures his debt, of course he can claim no more than his debt from the office ; but where a creditor has a general interest in the life, or in the property of a debtor, and protects this interest to an extent not objected to by the assurers, I am not aware of any decision or principle that entitles the debtor to claim what is over, after the interest of the insured is satisfied.

THE COURT then pronounced the following interlocutor :—
“ Adhere to the interlocutor reclaimed against, so far as it finds that the defender is not entitled to credit for the amount of the three bills mentioned in the said interlocutor : *Quoad ultra*, alter the said interlocutor, and find, 1. That the heritable property conveyed by the disposition, of the date of 28th day of October, 1842, to the defender, was not held by him in trust for the deceased George White ; 2. That the pursuer is not entitled to demand payment of the sum recovered by him under the policy of insurance on the life of the said George White, and that the same belongs to the defender. But, in respect of the consent of the defender, stated at the bar, Find, that the defender is not to take credit for the composition on the debt originally due to him by the late George White, as a deduction from the balance of the price of the house ; Find, that the defender must produce reason-

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

able evidence of the settlement of the debts of such creditors who are not included in the defender's list of payments, and of the terms on which they were settled; or, in the event of proof not being recoverable, in cases where claims have been made, or may be made, must free and relieve the pursuer of the same, at the rate of a composition of ten shillings in the pound."

MRS. MARIA THERESA WEMYSS or ROSE, pursuer; THE MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY, defenders.¹

(11 Court of Session Cases, 2d series, 151. 1848.)

Completion of contract. — A party who was subject to epileptic attacks proposed to insure his life with a company who undertook to effect insurances on diseased lives. The company had no settled rates of insurance, but fixed the amount of premium in each particular case according to its own circumstances. In this case they transmitted to their agent a letter to the party who proposed the insurance, accepting the proposal, on receiving a premium of more than twenty per cent. Owing to an unfavorable change in the party's health, the agent did not deliver this letter. *Held*, that as this letter contained the first specification of the terms on which the proposal would be held as accepted, no completed contract of insurance was constituted till it had been communicated to the party, and he had intimated his acceptance of the terms and conditions it contained.

MR. PATRICK ROSE, sheriff-clerk of Banff, proposed to effect an insurance on his life for £1,500 with the Medical, Invalid, Life Assurance Society of London. The society having considered his proposal, on 19th June, 1844, inclosed to Mr. Lillie, their agent at Banff, a letter to Rose, to the following effect: "Sir, — I beg to inform you that the proposal made by you to this society to effect an assurance on the life of yourself for the whole term for the sum of £1,500, has this day been accepted, and the policy will be issued on the payment of £354 12s. I am your most obedient servant.

(Signed) "F. G. P. NEISON, *Actuary*.

"Premium £351 12 0

"Policy stamp 3 0 0

£354 12 0

"If the above sum is not paid within fifteen days from this date, a second appearance for medical examination will be required. Please bring this letter with you, ^x/₈₄₅. Office hours from ten to four o'clock." At the same time their actuary wrote to

¹ See also 10 Ct. Sess. Cas. 2d series, 156.

Lillie himself: "I beg to inclose you the letter of acceptance in the case of Mr. Patrick Rose, which you will be pleased to forward to that gentleman." Mr. Rose having before receipt of this letter by Lillie become much worse, Lillie did not forward it, and refused to accept payment of the premium, when offered by some of Rose's friends. On Lillie's refusal, a letter of credit for the amount of the premium was transmitted by Rose's friends to the society's actuary in London, and returned by him. Payment was again tendered to Lillie, and again refused by him, when the amount was consigned with the Commercial Bank. Rose died a few days afterwards, and the insurance society having refused to pay the amount of the proposed insurance, his widow raised the present action against them.

Their defences were: 1. That the contract had never been completed, in [this] respect, [that] the letters of acceptance had never been delivered to Rose. 2. That Rose himself was in a state of mental incapacity, and was not in a position to agree to the condition as to the amount of the premium contained in the letter of acceptance, and his friends had no authority to do so for him. 3. Even had Rose been in a capacity to accede to these terms, he was barred from doing so by the material intermediate change of his health, and the society were not bound by an offer made in ignorance of that change.

The whole circumstances of the case are very fully detailed in the following interlocutor of the lord ordinary: "The lord ordinary having heard parties' procurators on the closed record, documents produced, and whole process,— Finds, that on the 15th of March, 1844, a proposal was made to the defenders for an insurance on the life of the late Patrick Rose, sheriff-clerk of Banff, to the extent of £1,500 sterling: Finds, that it is part of the business carried on by the defenders to grant policies of insurance on unsound or diseased lives; and finds, that in the proposal of the said Patrick Rose, whose age was stated at sixty-four years, he set forth, *inter alia*, that he had been subject to rheumatism at times; that he had had fits of an epileptic nature within the four preceding months; that he had been operated upon for piles, but was cured; that he had long been in good health in time past, but that he was rather weak from late indisposition, from which he then felt much recovered: Finds, that in the report of his medical attendant, Dr. Henry Milne, dated 14th March, 1844,

the state of health of the said Patrick Rose is described as having been good until the four preceding months, but was then somewhat impaired in consequence of illness ; that he, the said Henry Milne, had attended him for piles ten months preceding, but that complaint had been then removed, and also for attacks of an epileptic nature which had come on about four months preceding, but that he had not had any return of them for about three weeks, and that his general health had been considerably improved : Finds, that the defenders having required a separate, private, and confidential report from the said Henry Milne, as their own medical officer, such report was made by him on the 25th of March, in which he, *inter alia*, stated that the said Patrick Rose was then under a gentle course of medicine ; that he had suffered much from hemorrhoids, but was cured, having undergone an operation for their removal ; that about four months preceding he had been seized with attacks of an epileptic nature, and had had several of them since, but for about a month preceding kept free of them, until the morning of the said 25th of March, when he had one in bed, and that he then had a seton in the back of the neck : Finds, that it appears from the books of the defenders that their medical committee in London, on the 1st of April, 1844, deferred the consideration of the proposed insurance for the period of three months : Finds that, on the 14th of June, 1844, on a renewed application to the defenders, another report, dated the 11th of that month by the said Henry Milne, as their medical referee, was transmitted to them in London by their agent in Banff, and that the said report bore, *inter alia*, that the general health of the said Patrick Rose was good ; that none of the veins were swollen, except the hemorrhoidal ; that his appetite was too good for his digestion ; his mind having become much impaired, he did not control himself in the way of eating ; that he was subject to epilepsy ; that there was always reason to dread an apoplectic attack in such a case ; that he had a seton in the back of his neck ; and, finally, that he had been liable to epilepsy for upwards of six or seven months ; and although these attacks were now less severe and less frequent, the complaint had greatly affected his brain, and his mind was much weakened ; but that from his general health being so good, with proper treatment and control, he might live a considerable time ; and as to an insurance on his life, with a considerable additional premium for the in-

creased risk, the company might do well to effect it : Finds, that it further appears from the books of the defenders, that the medical committee in London on the 18th of June, 1844, recommended the risk to be accepted on the table of apoplexy ; and that at a meeting of the board, on the 19th of June, the proposal, No. 849, being that originally made by the said Patrick Rose, on the 14th of March, 1844, was accepted accordingly : Finds, that in the said proposal, on behalf of the said Patrick Rose, no table of apoplexy was referred to, nor was such table, or any rate of insurance, communicated to him at that time ; and finds that the said proposal does not refer to, or fix in any way, the premium which he offers to pay to the office ; and, therefore, that the acceptance by them on the table of apoplexy, on which table no offer had been made by the said Patrick Rose, did not constitute a concluded contract, and, accordingly, that the said contract was not concluded, nor the life of the said Patrick Rose insured on the said 19th of June : Finds, that on the same day the agent of the defenders in London addressed a letter to the said Patrick Rose, stating that his proposal had been accepted, and that the policy would be issued on payment of the sum of £354 12s., being the amount of the proposed annual premium, and £3 for a stamp ; and further intimating, that if the above sum was not paid within fifteen days, a second appearance for medical examination would be required : Finds, that the said letter was not transmitted direct to the said Patrick Rose, but was inclosed in another letter addressed to the agent of the defenders in Banff, with instructions to forward the same to the said Patrick Rose : Finds, that the said letter arrived in Banff on Sunday, the 23d of June, and that it is alleged by the pursuer that on Monday, the 24th, the said letter was delivered, or the substance of it duly communicated by the authority of the agent in Banff to certain persons acting on behalf of the said Patrick Rose ; and finds that, on the said 24th of June, the amount of said premium was tendered by Messrs. John Watt, Charles Watt, and William Grant, to the agent in Banff, and that he having refused to receive the same, the amount was transmitted on the 25th of June to the agent in London, but returned : Finds, it is denied by the defenders that the said letter was ever delivered, or its contents communicated by their agent at Banff to the said Patrick Rose, or any person in his behalf ; and finds that, until an authorized

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

communication by the defenders, or their agent acting on their behalf, to the said Patrick Rose, or to an agent on his behalf was made, the defenders were entitled to resile, and were not bound, matters otherwise remaining entire, to communicate their acceptance of the proposal, and the condition with respect to premium, which they annexed to that acceptance : Finds, that the defenders also deny that the said John Watt, Charles Watt, and William Grant, or either of them, were authorized by the said Patrick Rose to offer any premium of insurance on his behalf : Therefore, finds that the pursuer is bound to prove in the first place the delivery of the foresaid letter of 19th June, or the authorized communication of the contents thereof on the said 24th of June, as averred, and the authorized tender of the premium, and that she is bound to take an issue to that effect : Finds, that, in the event of its being found established that the said acceptance of 19th of June was duly communicated on the 24th, and the premium duly tendered on that day, whereby the said Patrick Rose agreed to the condition in the acceptance, and became bound to pay the premium in time coming, the defenders would not have been entitled to refuse acceptance of the said premium, unless upon the ground that there was a material alteration in the nature of the risk betwixt the said 19th and 25th of June : And finds, that in statements VII. and VIII., on the part of the defenders, they allege that there was such a material alteration on the state and condition of the said Patrick Rose, and that they agreed at the debate to take an issue to that effect ; and, with these findings, remits to the issue clerks to prepare, first, a suitable issue for trying the question, on the part of the pursuer, as to delivery of the letter of 19th June, or authorized communication of its contents ; and, secondly, an issue, on the part of the defenders, as to the alleged material change in the nature of the risk between the said 19th and 25th of June, so far as the respective statements in the record authorized such issues, or either of them.”¹

¹ “It appears to the lord ordinary to be essential, in the first place, to fix the precise date of the alleged insurance, which undoubtedly might have been effected by a concluded contract, without any policy of insurance having been actually issued. It will not do, as proposed by the pursuer, to send an indefinite issue to the jury, whether a contract was entered into on or about the month of June. It must be specially ascertained when the risk attached.

“Now, 1st, it appears to the lord ordinary to be clear that this did not

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

Mrs. Rose reclaimed, and pleaded : —

The whole case should have been remitted to the issue clerks,

take place on the 19th of June ; for at that time no premium (and premium is of the essence of the contract) had ever been agreed to on the part of Mr. Rose, and, the higher the premium was, the less likely was he to agree to it. If, however, he was not in law liable on the 19th of June for payment of the premium, how can it be maintained that on that date the risk attached, and that the company was bound to pay the amount of the insurance in the event of his dying on the 20th of June ?

“ 2. No rate of premium having ever been agreed to on the part of Mr. Rose prior to the 19th June, and the contract being then incomplete, whatever resolution the company might form, they were not bound to communicate that resolution to Mr. Rose unless they thought proper. They made no such communication directly to him. They sent the acceptance to their agent to be forwarded ; but as long as he did not obey their instructions, (for which disobedience he was responsible to his constituents only,) and did not forward the acceptance, it was an undelivered instrument. If he retained it, he did so at his own risk, though answerable to his own employers for his conduct. He never held it for behoof of Rose ; and if he had heard of any change material to the risk before delivering the acceptance, (even though the rumor might have turned out unfounded,) he was entitled and bound, as acting for the office, to withhold the letter until he became satisfied as to the propriety of closing the transaction. The pursuer undertakes to prove that the letter was delivered, or the acceptance authoritatively communicated, on the 24th June. This is essential to her case ; and if proved, then the tender of the premium on that day was made tempestive, and thus the *prima facie* case of the pursuer would be complete, and the *onus* shifted on the defenders to show cause why they rejected the tender.

“ 3. The defenders accordingly aver that between the 19th, when they agreed to take the risk on the table of apoplexy, and the 24th, when the premium was tendered, there was a material change in the condition of the party proposed to be insured, so that in law it became truly a different risk. Had the party died before the 24th, plainly the contract could not have attached. It seems clear the consequence would have been the same had he been struck with a new disease of a serious character, or met with an unforeseen accident of an alarming description. Still, in such an event the principle on which the company would have been free could only be a material change in the risk. In this case, it is true, the office did not undertake to insure a sound life, but a diseased one ; and, therefore, it may be the more difficult for them to prove that, between the date of the proposal and the tender of the premium, there was such a material change in the condition of the party as altered the risk. Mere ordinary fluctuation in the disease would not do. The nature of the change is a question of degree, and a heavier *onus* is imposed on the defenders in consequence of the description of lives which they insure. That speciality — however it affects the extent of change necessary to be proved — does not alter the nature of the contract. The defenders cannot on that account be compelled to complete a contract upon a risk substantially different in point of condition from that which it bore when the proposal was made.”

without the various findings made by the lord ordinary. In particular, she objected to the finding that there was no concluded contract on the 19th of June. The lord ordinary had confounded two things, viz., the date when the contract was concluded, and the date on which the risk attached. The letter of the actuary of the insurance company gave fifteen days to Rose to deliberate whether or not he should accept the insurance at the rate proposed. During this interval the company were bound, though Rose was not, but immediately on his declaring his acceptance of their terms, the risk attached from 19th June, the date of the company's acceptance of his proposal. The acquiescence of Rose in these terms might be proved from facts and circumstances. Upon this matter, as well as with regard to the other findings of the lord ordinary, the pursuer had additional evidence in support of her case, which she meant to adduce at the trial, but from the benefit of which she was precluded by these findings. The issue should not be restricted to the mere question whether there had been a delivery of the letter of acceptance, but should ask generally whether there had been a contract between the parties?

The defenders pleaded :—

They had no fixed and authorized table of rates at which they proposed to insure lives, and the proposal made by Rose had no reference to any fixed rate. There could, therefore, be no contract until he had intimated his assent to the terms on which the defenders proposed to accept his proposal, and which he was at liberty to reject. It was not averred on the record that there were any facts and circumstances to show that there was any contract as at 19th June. That was a pure question of law which should be settled before the case was sent to the jury.

LORD PRESIDENT. I think the parties are entitled to a judgment as to whether there was a concluded contract between Rose and the defenders as at 19th June; but that does not render it necessary that we should precede our finding on that point by an adherence to the other findings of the lord ordinary. I am aware that great embarrassment may arise from these findings. But as to the question whether or not this company, by the communication made to their agent, entered into any contract?—on the abstract question raised on this letter, I find no difficulty. This society is peculiarly constituted; it undertakes the greatest risks, and, of course, its rates of premium are proportionally high. In

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

this case it undertook the risk of an apoplectic attack, and the premium amounted to more than twenty per cent. Now, in such a special case, I hold that the communication of the company must have been received and explicitly assented to by Rose, before there was any completed contract. I think that a perfectly clear proposition; and therefore I am in a position to decide that on 19th June there was no completed contract. Then it is a question for the jury, whether the pursuer can make out her case in spite of this finding?

With regard to the other findings of the lord ordinary, I have no doubt his lordship thought he was going on admitted facts, and I dare say his findings are perfectly sound. But I do not think it expedient or necessary to transmit the case with these findings, which may occasion considerable embarrassment at the trial; and I am inclined to think we should recall that part of his interlocutor as unnecessary.

LORD MACKENZIE. I concur in thinking that there was here no completed contract on 19th June. No communication was made to Rose, and, in fact, nothing was done. I cannot hold that the company's having written and transmitted a letter to their own agent which he received, is at all sufficient to bind them in a contract with a third party. I do not think it necessary to go any further into the case. I agree also, that it is much better to avoid any findings as to the exact state of the facts. That can only incumber the case, and the slightest inaccuracy may prove extremely troublesome at the trial.

LORD FULLERTON. I think it of no great importance to find that there was no completed contract on 19th June. The pursuer does not maintain that there was any completed contract on that day. A much more important question is, whether, after the company had transmitted this letter to their agent, the latter was entitled to withhold it from Rose. That is decided by the concluding part of the interlocutor, where the lord ordinary "Finds, that in the event of its being established that the said acceptance of 19th of June was duly communicated on the 24th, and the premium duly tendered on that day, whereby the said Patrick Rose agreed to the condition in the acceptance, and became bound to pay the premium in time coming, the defenders would not have been entitled to refuse acceptance of the said premium, unless upon the ground that there was a material alteration in the

nature of the risk betwixt the said 19th and 25th of June." I should wish to know if the court are prepared to adhere to that finding; for if not, the whole question is left open.

LORD JEFFREY. My impression is, that it is maintained by the pursuer, that the execution and dispatch of the letter of 19th June gave Rose a *jus quaesitum*, and did, in fact, conclude the contract. Some of the points decided by the lord ordinary are of great importance; and I think it may be expedient that we should give an opinion upon them, whether we adhere to his lordship's views, or dissent from them. At the same time it may be safe to recall them, and send the case open to the jury, although they do involve questions of great legal importance. The first question is, *esto* that the agent had no right to withhold this letter from Rose, but did, in point of fact, do so. If, after his having so withheld it, an unfavorable change took place in that party's health, can the company be allowed to profit by this illegal act of their agent? That is a point of some nicety. Again, was the agent entitled, if he knew of such a change of circumstances, on his own responsibility to withhold delivery of the letter? These are points which will, no doubt, be raised at the trial.

On the other findings, to which your lordship has spoken, I concur. It is expedient to decide this point before the case is sent to the jury; and I am inclined to recall the lord ordinary's interlocutor, with a finding, that the mere execution and transmission of the letter of 19th June did not complete the contract. I would be disposed to add, "Nor was there any contract between the parties till the acceptance of the terms proposed by the company were [was] duly intimated to their agent by Mr. Rose."

LORD PRESIDENT. I have no objection to that addition.

LORD MACKENZIE. I am inclined to hold, that neither was there any contract completed, nor had Rose any option to accept the company's terms till they were communicated to him. Communication of their letter may have given him a right of option, yet not have completed the contract; but on 19th June, I think there was neither a completed contract, nor even a right of option given.

LORD JEFFREY. I think we should merely find, that the transmission of the letter of 19th June did not complete the contract; nor could any contract be concluded till that letter was communicated to Rose, and its terms assented to by him.

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

THE COURT pronounced the following interlocutor: Recall the interlocutor of the lord ordinary complained of; and in respect that the letter of the defender's actuary of 19th June, 1844, though purporting generally to be an acceptance of the late Patrick Rose's proposal for an insurance on his life, of the 14th March preceding, was yet qualified by the condition of his agreeing to pay an annual premium of £354 12s., and contained the first specification of the terms on which alone that proposal could be held as accepted. Find that no concluded contract of insurance was or could be constituted by that letter, till it had been communicated to the said Patrick Rose, and he had intimated his assent to the terms and conditions it contained; and with this finding, remit to the lord ordinary to direct the preparation of such issues as may be calculated to try the merits of the cause, reserving all questions of expenses."

See *S. C.*, *infra*.

MRS. MARIA THERESA WEMYSS or ROSE, pursuer; THE MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY, defenders.

(11 Court of Session Cases, 2d series, 158. 1848.)

Issue. Change of risk. — A party who was subject to epileptic fits proposed his life for insurance with a company who undertook to effect insurance on diseased lives. His representatives averred that the contract was completed, and sued the insurance company for the sum contained in the policy. The company denied that any contract had been entered into. *Held*, that the company were entitled to an issue, as to whether, during the negotiations between the parties, there had been a material change of risk, although they merely averred that the epileptic fits had been more frequent and violent, and did not aver that there was an accession of any new and different disease.

SEQUEL of preceding case.

In their statement of facts, the insurance company averred that previous to the receipt of their letter by Lillie, and on or about the 22d of June, Mr. Rose had been thrice attacked by alarming fits, and was reduced to such a state of danger as entirely altered the circumstances of the proposal, and would have put any party interested in effecting the insurance in *mala fide* to conclude the transaction. Mr. Rose himself was not in a capacity for so concluding it, by agreeing to pay the stipulated premium and otherwise, or for exercising his faculties in any matter of business. From the 22d of June till the 2d of July, when he died, Mr. Rose

remained in a state of continual insensibility and incapacity of mind.

Their third plea in law was, that even had Rose been in a condition to accept of their proposal, he was barred from doing so by the material intermediate change of his health, and the company were not bound by an offer made in ignorance of that change.

The cause having been remitted to the issue clerks, the following issues were returned : —

“ It being admitted, that on the 2d day of July, 1844, the said Patrick Rose died, and that the pursuer is his widow and executrix ;

“ It being further admitted that, on the 15th March, 1844, a proposal was made to the defenders for an insurance on the life of the said Patrick Rose, to the extent of £1,500 sterling ; and that thereafter, on or about the 19th of June, 1844, the actuary of the defenders in London forwarded by their authority, to their agent in Banff, the letter, No. — of process, addressed to the said Patrick Rose, and intimating that the said proposal of insurance on his life had that day been accepted, and that the policy would be issued on the payment of £354 12s., as premium and stamp ;

“ It being also found by an interlocutor of the first division [of] the court in this cause, dated 21st June, 1848, that in respect of the letter of 19th June, 1844, though purporting generally to be an acceptance of the late Patrick Rose’s proposal for an insurance on his life, of the 14th of March preceding, was yet qualified by the condition of his agreeing to pay an annual premium of £351 12s., and contained the first specification of the terms upon which alone that proposal could be held as accepted, no concluded contract of insurance was or could be constituted by that letter till it had been communicated to the said Patrick Rose, and he had intimated his assent to the terms and conditions it contained ;

“ Whether, on or about the 24th day of June, 1844, a contract of insurance was concluded to the effect foresaid by the communication of the said letter to the said Patrick Rose, and his intimation of his assent to the terms and conditions therein contained ; and whether the defenders are indebted and resting owing to the pursuer, as his executrix, the said sum of £1,500, or any part thereof.”

“ Or, Whether, on or about the 22d of June foresaid, and prior to any contract or agreement for such insurance being concluded

between the said parties, a change amounting to a material alteration of the risk, and of the circumstances of the proposal, had taken place in the health and condition of the said Patrick Rose, from the state in which he had previously been represented or known to the defenders, when the foresaid letter of 19th June, 1844, was written and sent as aforesaid ?”

Mrs. Rose moved the court to disallow the counter issue. She pleaded: The liability of Rose to epileptic attacks, and their frequency, was known to the insurance company when they fixed the rate at which his proposal should be accepted; and was, therefore, one of the risks undertaken by them. To establish a change in the risk incurred by the company, it was necessary to show, not merely that there had been an alteration or variation in the character of these attacks, but that there had been an accession of some new element of danger. There was no such statement on record. The counter issue did not meet the pursuer's. If a contract had been entered into, such an issue was irrelevant, unless it had been averred that there was fraudulent concealment on the part of Rose or his friends; and that was not averred. If no contract had been entered into, it was unnecessary for the defenders to explain why they did not enter into it.

The defenders pleaded:—

If a material change occurred in the state of health of the party proposing the insurance, it did not signify whether his life was a good or a bad one. An increase of violence in the disease was a variation in the risk. Epilepsy, in particular, was a disease which was very variable in kind and degree.

LORD PRESIDENT. The defenders are entitled to show that there was a change in the risk; and no uncertainty on this point should be allowed to exist.

LORD MACKENZIE. If it is averred that one who had been for some time subject to attacks of this kind becomes moribund, and ultimately dies of the complaint: that is an averment of a change in the risk.

THE COURT approved of the issue as adjusted, reserving all questions of expenses.

See *S. C.*, *infra*.

MRS. MARIA THERESA WEMYSS or ROSE, pursuer; THE MEDICAL, INVALID, AND GENERAL LIFE ASSURANCE SOCIETY, defenders.

(11 Court of Session Cases, 2d series, 345. 1848.)

Completion of contract. Change of risk. — A company for the insurance of diseased lives offered, on certain terms and conditions, to insure the life of a person who at the time was laboring under epilepsy. In an action on the policy (after the party's death) against the insurance company, it was averred by them that their offer had never been accepted by the party wishing to be insured; and that the court found that no concluded contract of insurance was or could be constituted till the letter containing the offer of the insurance company had been communicated to the party wishing to be insured, and he had intimated his assent to the terms and conditions it contained. An issue was thereupon sent to the jury, — Whether a contract of insurance was concluded by the communication of the letter, and assent given to its terms and conditions. *Ruled* by the presiding judge, (and the ruling excepted to,) that the assent which must be proved to have been intimated was the assent of the party himself, and that no assent of any one else, whether his wife, or the trustees for his creditors, or the creditors themselves, or his agent, was sufficient.

The presiding judge further refused, on the call of the pursuer, to direct the jury, that to satisfy the terms of the issue it was sufficient to prove that the letter of the insurance company was communicated to persons authorized to act for the party in the management of his affairs, and was assented to by such persons on his behalf. This ruling excepted to.

Verdict for pursuer, finding that a concluded contract of insurance had been entered into.

Verdict set aside as contrary to evidence, and new trial granted.

Under an alternative issue, whether, prior to any contract or agreement of such insurance having been concluded, "a change amounting to a material alteration of the risk and of the circumstances of the proposal, had taken place in the health and condition" of the party proposed to be insured. *Ruled* by the presiding judge, (not excepted to, and afterwards confirmed by the opinions of the court,) that it would be a change material to the risk, if the disease of the party became aggravated in its character from what it was at the time of the proposal of the insurance, and that it was not necessary, to constitute such a change, that the disease should alter from one kind of disease to an entirely different one.

Verdict for pursuer, finding that there had been no such change. Verdict set aside as contrary to evidence, and new trial granted.

SEQUEL of the preceding case.¹

The following issues were sent to a jury: —

"It being admitted, that on the 2d day of July, 1844, the said Patrick Rose died, and that the pursuer is his widow and executrix;

"It being further admitted that, on or about the 15th of March, 1844, a proposal was made to the defenders for an insurance on the life of the said Patrick Rose, to the extent of £1,500 sterling; and that thereafter, on or about the 19th of

¹ The evidence is now set forth more in detail to show the falsity of the verdict.

June, 1844, the actuary of the defenders in London forwarded, by their authority, to their agent in Banff, the letter, No. — of process, addressed to the said Patrick Rose, and intimating that the said proposal of insurance on his life had that day been accepted, and that the policy would be issued on the payment of £354 12s., as premium and stamp;

“ It being also found, by an interlocutor of the first division of the court in this cause, that in respect [of] the letter of 19th June, 1844, though purporting generally to be an acceptance of the late Patrick Rose’s proposal for an insurance on his life, of the 14th of March preceding, was yet qualified by the condition of his agreeing to pay an annual premium of £351 12s., and contained the first specification of the terms upon which alone that proposal could be held as accepted, no concluded contract of insurance was or could be constituted by that letter till it had been communicated to the said Patrick Rose, and he had intimated his assent to the terms and conditions it contained;

“ Whether, on or about the 24th day of June, 1844, a contract of insurance was concluded to the effect foresaid by the communication of the said letter to the said Patrick Rose, and his intimation of his assent to the terms and conditions therein contained; and whether the defenders are indebted and resting owing to the pursuer, as his executrix, the said sum of £1,500, or any part thereof?

“ Or, Whether, on or about the 22d day of June foresaid, and prior to any contract or agreement for such insurance being concluded between the said parties, a change, amounting to a material alteration, of the risk, and of the circumstances of the proposal, had taken place in the health and condition of the said Patrick Rose, from the state in which he had previously been represented or known to the defenders, when the foresaid letter of 19th June, 1844, was written and sent as aforesaid?

“ Sum assured, £1,500.”

The defenders were a company for the insurance of diseased lives, to whom Rose applied for insurance on his life. He stated in his answers to the queries put to him, that he had recently before been operated upon for piles, and was subject to epileptic fits. Before accepting the insurance, the company obtained a report, in March, 1844, from Dr. Milne, Rose’s medical attendant, and their own medical adviser, which set forth that

his health had been good till within the last four months, but was then somewhat impaired in consequence of illness. Dr. Milne farther stated that he had about ten months previously attended Mr. Rose for piles, which were now cured, and for attacks of an epileptic nature, which had come on about four months previously; but that he had not had any return of these for about three weeks, and that his general health had improved.

The company requested another report from Dr. Milne, who, on 25th March, after a detailed statement as to the general health, again stated that about four months previously Rose had been seized with attacks of an epileptic nature, and had several of them since, but that for about a month back he had kept free from them until that morning, viz., the 25th March, when he had one in his bed.

Again, Dr. Milne, on 11th June, made another report. In addition to the statement in the former reports, it was communicated to the defenders that Rose's appetite was too good for his digestion, his mind having become much impaired, and that he did not control himself in the way of eating. It was further stated that he was subject to epilepsy, and that in such a case there was always reason to dread an apoplectic attack. Dr. Milne concluded his report with stating that "Mr. Rose has been liable to epilepsy for upwards of six or seven months; and, although these attacks are now less severe and less frequent, the complaint has greatly affected his brain, and his mind is much weakened. I think, however, from his general health being so good, that, with proper treatment and control, he may live a considerable time.

"As to an assurance on his life, with a considerable additional premium for the increased risk, I dare say the company may do well to effect it."

On considering these reports, the defenders took the insurance, and classed the insured under the head of *apoplexy*, (not merely epilepsy,) and charged the premium payable for apoplectic patients.

The secretary of the company communicated this to Lillie, their agent at Banff, by a letter in these terms:—

"I beg to inform you that the proposal made by you to this society to effect an insurance on the life of yourself, for the whole

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

term, for the sum of £1,500, has this day been accepted, and the policy will be issued on the payment of £354 12s.

"I am, sir, your obedient servant, &c.

"Premium £351 12s. 0d.

"Stamp 3 0 0

"First payment £354 12s. 0d.

"If the above sum is not paid within fifteen days from this date, a second appearance for medical examination will be required. Please to bring this letter with you. Office hours from 10 to 4 o'clock. No. 849."

This letter was inclosed in one to Mr. Lillie, the agent, informing him that Mr. Rose had been accepted, and instructing him to deliver the letter of acceptance to that gentleman. The letter to Mr. Lillie was expressed in the following terms: "In answer to yours of the 14th inst., I beg to inclose you the letter of acceptance in the case of Mr. Patrick Rose, which you will be pleased to forward to that gentleman. I am," &c.

The letter of the London secretary to Lillie was received by him on Sunday morning, the 23d of June. On the preceding day Rose had become worse in his health. On the Monday, Lillie gave the letter to Dr. Milne, whom he met, and he learned from him on the same day that he had given it to William Grant, one of Rose's trustees. (He had executed a trust deed for behoof of creditors.) Lillie had promised to give the letter to Grant. At a meeting of Rose's trustees on the same day, Lillie communicated to them the fact of his having received the letter. At this meeting the letter was returned to Lillie on his request. Watt, another of the trustees, then gave up the letter because of the notice at the end of it. "Please to bring this letter with you;" and the trustees, twice on the same day, tendered payment of the premium, which Lillie declined to receive, on account of the change to the worse in Rose's health.

On Saturday, the 22d June, Rose had three fits of epilepsy, from which he recovered. On Monday, the 24th, Grant called with the letter of 19th June, and read it to Rose. At this time, two witnesses, his attendant Chapman, and (although to some extent there was a contradiction by the one of the other) his depute in the office of sheriff-clerk, Colville, deponed that he had a clear understanding of what he was doing. The witnesses said

that he spoke of the insurance with satisfaction, but complained of the premium being high; and, in short, that he agreed to the insurance. On the other hand Dr. Milne, on 25th June, addressed a letter to Lillie, in which he informed him that Rose's health had been much worse from Saturday the 22d, on which day he had had three attacks of his complaint, and had since been more or less unconscious, while his other symptoms were unfavorable, and he considered his life in great danger. Dr. Milne deponed that he was in this state of unconsciousness on the 24th and 25th; and in this, contradicted the two witnesses above referred to. He gave it, too, as his opinion, that if Rose had been told on the Monday that his proposal of insurance had been accepted, he would not have understood it; and Dr. Milne deponed that after the 22d June he would not have advised the risk, or given the opinion he gave on the 11th June, as to taking the insurance. But his symptoms fluctuated much. On the 26th Rose rallied to such a degree that Dr. Milne reported him as decidedly better, gradually recovering from his last attack, and that in a few days he would be as well as when Dr. Milne made his report of the 11th June. Later on the same day, Dr. Milne addressed a letter to the London secretary in which he referred to his previous report in the morning, and stated that on visiting Rose in the evening he found him not so well, and that in consequence of the attacks which Mr. Rose experienced on the 22d, he feared that he would not get better, and considered his life in danger. But two days thereafter (on 28th of June) Dr. Milne again wrote Lillie, and stated that he was glad to inform him that Rose was considerably better in every respect, and requested him to communicate the improvement in his health to the directors of the assurance society by that day's post. Rose died on 2d July. This closed the case for the pursuer. The defenders led no evidence. They argued that the letter never was offered to Rose, and was reclaimed by Lillie in time; that there was no proof of Rose having ever, in his rational mind accepted of the insurance in terms and on the conditions of the letter; that there was a change of circumstances in terms of the alternative issue, materially altering the risk, seeing that, while Dr. Milne in his report of 11th June advised the risk to be taken, he deponed, that after the 22d he would not have advised it; after that he was doomed — his death was certain. That was material to the risk. It is argued on the other

side, that he was insured as an epileptic patient, and that there is no material change or increase of risk by an increase of the same disease. But that was not an answer. The defenders accepted a particular risk, considered advisable by the physician; but before their offer was accepted, a totally different risk arose, which the physician considered inadvisable. The company took the risk with the patient having a prospect of life for some years; but while the matter was still in the hands of the defenders or their agents, Rose had sunk into the condition, that he had not the prospect of a week's life.

The lord president charged the jury, and, after reading over his notes of the evidence, continued thus: It is necessary that you should be satisfied that the acceptance of the letter of 19th June was made by Rose,—that he had declared his will to accept the offer in that letter, to pay the premium therein specified, and had agreed to the terms of the company. The court, by their judgment, found that the proposal itself did not conclude a contract until Rose had accepted it. That lays upon the pursuer the necessity of proving to you that Rose was in a capacity to accept, and that in his sound and sober senses he did accept that proposal. The communication must be proved to have been made to Rose himself, and by him alone could the assent be given. Neither his creditors nor his trustees could accept for him; and if you are of opinion, therefore, that there is no proof of Rose's own acceptance, you must find on the first issue for the defenders.

As to the second issue, I state to you this, that if a change in Rose's condition, which materially alters it to the worse can be made out, then the defenders are also entitled to a verdict on the second issue. If you do not think that the change which took place in Rose's health between the time when the company in London decided on the risk upon the reports then before them, and the time when the letter arrived in Banff was material, you will find for the pursuer. But, on the other hand, you must keep in view the evidence of Dr. Milne in coming to a conclusion on this point,—the sole medical evidence in regard to this man's capacity. When you remember what this gentleman said, can you have any hesitation in thinking that there had taken place a change in Rose's health of great importance,—a material aggravation of the risk? According to his evidence Rose had, on the 22d of June, become much worse. His chances of life were far

smaller than they were at the time when the directors agreed to, and sent off their acceptance of the proposal; and the premium, which they had agreed to accept upon those better chances of life, could not in common justice be insisted on by Rose as a fair premium, when the doctor in reality declared that his hours were numbered. On the 25th, his mind was so impaired, and his general health so bad, that the doctor declares that he would not on that day have made his report of the 11th June, which recommended the insurance to be taken, and on which the directors acted.

Does it require anything more than this to constitute a material alteration of the risk? It matters not that there was no change from one disease to another. The company had taken the risk of an epileptic patient at a certain stage of that disease, calculating their premium accordingly, and they were not bound to take afterwards a patient in a more advanced stage, and with lesser chances of life. They had a right to be informed of this change of condition. It was implied, that when the acceptance was made, the patient should be in the same condition of health as when the proposal was agreed to, and sent off to him. It is often a nice question in life insurance law, whether a change that has taken place is material to the risk, but the nicety generally arises from the difficulty of balancing conflicting medical testimony. Here we are freed from any such questions, in respect that there is only one medical witness, who gives evidence against the pursuer. I agree entirely in what has been said by the counsel for the pursuer, that there was no change in the nature of the disease. Palsy did not come in room of epilepsy, nor was the latter disease substituted by fever. It is simply a change in the same disease of epilepsy from bad to worse; but, in my opinion, that constitutes such a change as was material to the risk, and so entitles the defenders to a verdict on the second issue.

Inglis, for the pursuer, excepted to the charge, in so far as it ruled that the assent, which must be proved under the first issue to have been intimated, is the assent of Rose himself; and no assent of any body else, whether Mrs. Rose, or the trustees, or the agent, or the creditors, is of signification.

Inglis, for the pursuer, also called upon the court to direct the jury, that to satisfy the terms of the first issue, it is sufficient for the pursuer to prove that the letter of the insurance company

Wemyss v. The Medical, Invalid, and General Life Assurance Society.

was communicated to a person or persons authorized to act for Rose in the management of his affairs, and was assented to by such person or persons on behalf of Rose.

LORD PRESIDENT. I refuse to give that direction.

Inglis thereupon also excepted against this judgment.

Verdict for the pursuer on both issues.

A new trial was thereafter moved for in this case, on 3d March, on the ground of the verdict being contrary to evidence.

Parties were heard at great length on the import of the evidence, when the following opinions and judgments were ultimately delivered:—

LORD PRESIDENT. Having been the presiding judge at the trial, I only state the impression now which I had at the time when the verdict was returned by the jury, to the effect that it was an erroneous verdict, and that there is a necessity for granting a new trial. I thought then, as I do now, that the verdict was against evidence; and having expressed that opinion, I consider it to be the proper course to abstain from any details as to the grounds on which it rests. Where a new trial is granted, it is always desirable that judges should not commit themselves to strong expressions of opinion upon matters of evidence that have again to be submitted to a jury. Of late, therefore, it has been our practice to adopt the English system, of merely intimating that a new trial shall be granted, and of stating our opinions in full when it is refused.

The new trial in this case must be extended to both issues, seeing that the evidence upon both is so blended together, and amalgamated, that it is difficult to distinguish it. At the trial I considered it my duty to state the law to the jury, according to the facts which I considered proved. To that law special exceptions were taken in writing, and authenticated. The jury retired, after hearing what I stated to them; and I have no hesitation in saying, that I was as much surprised at the extraordinary promptitude with which they returned their verdict, as the pursuer's counsel probably were. It appears to me clear, upon the first issue, that points necessary to be established for the success of the pursuer were not established. In particular, I was not satisfied with the way and manner in which Chapman, the person who attended Rose as a nurse during his last illness, gave his evidence. It required the greatest consideration, when looked at along with

the evidence of Colville. To me there appeared a manifest contradiction between the two. It is said that Rose had been apprised of the acceptance of the proposal, upon certain terms stated in the letter of the defenders. Now, in reference to the point whether or not that proposal had been agreed to by Rose, it is important to remember that a person who could have given the most important evidence as to his condition during his latter days, was not examined as a witness. The man who, according to Chapman's evidence, stood by his bed-side, and read to him the letter from the insurance company, announcing the acceptance of the proposal, namely, William Grant, a writer in Banff, was not adduced as a witness. The reason assigned now is, that he was the country agent of the pursuer, and therefore could not be called. This just tells against the parties who so disqualified him as a witness. The evidence of other witnesses who were examined for the pursuer was made admissible before their trial, by discharges of their interest and otherwise, but no trouble appears to have been taken to preserve Grant as a competent witness. He was improperly made an agent in the cause; and that circumstance must tell against the party who so disqualified him. I look upon his absence from the witness box as one of the most remarkable features in the case. Upon the first issue, therefore, I am clearly of opinion that it is not supported by anything like satisfactory evidence.

On the second issue, I cannot read the evidence of Dr. Milne without considering the verdict here also to be wrong. He was the only witness examined, and his evidence told decidedly against the pursuer. If his opinions were erroneous, the pursuer might have got many other medical persons to give their evidence, for the point on which he was called to speak was entirely a matter of opinion. Dr. Milne proves clearly that there was a great change, — a change which altered the nature of the risk, and so as to reduce the patient to such a condition, that he never would have granted the certificate of the 11th of June, if he had found Rose in the condition in which he was when the defenders' letter of the 19th of June arrived.

LORD MACKENZIE. I concur in that opinion, and for the reasons assigned by your lordship, I will abstain from entering at large on the case. It is plain that if we allow a new trial upon either issue, we must allow it upon both. If there had been a

material alteration of the risk, and of the circumstances connected with the proposal which had been made for an insurance, (that being the subject matter of the second issue,) it is impossible to hold that the jury could have found for the pursuer upon the first, because the first issue puts the question, "Whether the defenders are indebted and resting owing to the pursuer the said sum of £1,500, or any part thereof?" No contract of insurance could have been concluded if such a change had taken place, and no sum could therefore have been concluded if such a change had taken place, and no sum could therefore have been due to the pursuer under it. The issues are not separable, and are in point of fact connected together by the word "or."

My opinion rests upon this, that the jury could not, without a plain failure of their duty, find that there had been no change of the risk. What is the meaning of risk? Here it is the chances of gain and loss — the chance of the insured dying before the money was all paid to the company — in which case there was loss to them; or of his living after it had been paid, in which case there was gain to them. Were there any circumstances, then, which made a change upon these chances? No one can read that evidence without holding that there was material change. Rose had five fits in the interval, which rapidly succeeded each other, and which reduced him to a condition in which he never was before. He came to a condition in which the value of his life was, according to human probabilities, nothing. He was dying of the disease; that I take to be the result of the evidence of Milne. It is in vain to argue that he was a mere solitary witness; and in this I agree with your lordship.

It was, however, pleaded, that any change that took place must, in order to be material in a legal sense, be a change into a different disease. I have no doubt whatever that that argument is totally fallacious. A change is material, if it is a change in degree to the worse, though it be the same disease. Are the changes of loss and gain not varied, when such a change has taken place? On the whole, therefore, I am satisfied that there must be a new trial.

LORD FULLERTON. If the first issue had stood alone, I confess I would have felt considerable hesitation in interfering with the verdict of the jury, because they were the proper judges of the credibility due to the witnesses; and it is only as you believe one

set of the witnesses or the other, that the verdict on this issue can be held good or bad. But, on the other hand, I think the verdict on the second issue is clearly contrary to evidence; and as a new trial must be granted upon it, we must grant it upon both, as they cannot be separated.

LORD JEFFREY. I concur in the opinions which have been expressed. There can be no doubt that the overwhelming mass of evidence upon the second issue is against the verdict of the jury; and that being the case, we must also grant a new trial upon the first. If the only point in the first issue had been, whether there was any communication of the letter of the assurance company to Rose, and his assent to the terms of it, there might have been a difficulty in saying that the jury were not entitled to believe Chapman; and I should have great reluctance to disturb the verdict, merely because I gave credit to one set of witnesses, and they to another. But the second issue is connected with the first, and hence the impossibility of ordering a new trial on one, without ordering it on both. If there were a change of circumstances in the knowledge of the company's agent at Banff, he, acting upon his responsibility to his employers, might have refused to deliver the letter to Rose. I do not think that it was ever properly communicated, or authorized to be communicated, to Rose, so as to be assented to by him. It was never legally given up to him by the assurance agent, but transpired through the rash disclosure of its contents, and its delivery for his personal consideration to Milne. I agree with what has been said as to the change of risk, which may consist in a change of degree in the same disease: and it was admitted in the argument for the pursuer, that if Rose had the death-rattle in the throat on the arrival of the letter at Banff, that would have been a material change, though it were merely the consequence of the same disease. But it was very much the same sort of thing which occurred. Rose was in bed dying at the time when the letter arrived in Banff. This was not a life then; it was the going out of life.

THE COURT set aside the verdict, and granted a new trial on both issues.

The North British and Mercantile Insurance Company v. Stewart.

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
pursuer; STEWART, defender.

(9 Court of Session Cases, 3d series, 534. 1871.)

Mistake concerning death. Payment. Effect on Policy.—The holder of a policy of life insurance, having produced evidence to show that the person insured had died in Australia, received the amount of the policy from the insurance company. It was afterwards ascertained that the insured was still alive. The company demanded repetition of the sum paid, and refused to revive the policy, on the ground that they had been induced to pay by misrepresentations and undue concealment of facts within the holder's knowledge. In an action of repetition raised by the company, and a counter action of declarator, &c., raised by the policy holder, *held*, (after proof which established that the holder had acted *bonâ fide*,) that the policy was a subsisting policy, which the company was bound to redeliver on payment of the sums received and interest, and the premium which had fallen due.

STEWART, the holder, under an assignation for value, of a policy of insurance for £999 19s., effected in 1848 by a Mrs. Miller on the life of James M'Donald, a commercial clerk, applied on 4th December, 1866, to the North British Insurance Company for payment of the amount in the policy, alleging that James M'Donald had died some time previously in New Zealand.

The insurance company "thereupon required the defender to produce evidence of James M'Donald's death." After some correspondence in reference to the matter, Stewart sent to the pursuers affidavits sworn in the supreme court of New Zealand. These affidavits were to the effect that a certain James M'Donald was drowned on or about 3d December, 1865, at the Big Ford, in Teremakan, New Zealand, and that certain letters were believed to have been found upon his body, which had been sent to the foresaid James M'Donald, the assured. The defender also sent to the pursuers sundry letters from persons then or formerly resident in New Zealand, to the effect that the said James M'Donald had died there some time previously.

Being satisfied with the evidence produced, the insurance company, on 19th December, 1868, paid to Stewart £1207 7s. 4d., the amount in the policy with bonus additions.

In December, 1869, the insurance company discovered that James M'Donald, the assured, was still alive, and they immediately raised an action concluding for repayment of the sum paid to Stewart, with interest.

They averred that the payment had been made in consequence

of representations by Stewart, and that "at the time when the defender made the representations to the pursuers he knew, or had good reason to know, that James M'Donald had not died at the date and in the manner represented. The pursuers have recently learned that in the course of the year 1866 the defender received a letter from the said James M'Donald, dated 8th January, 1866. The defender concealed this fact from the pursuers when he applied for payment of the policy, and made the representations above set forth."

The defender did not admit on record that M'Donald was alive.

He pleaded, (1) This defender is not bound to repay as concluded for, unless he is replaced in the position in which he stood when the alleged essential error took place, by the policy being revived. (2) The pursuers, not alleging any fraud, are not entitled to take advantage of error to recover the sum in the policy, and at the same time to refuse to place the defender in the position in which he stood when the error arose. The pursuers replied: (4) The defender's pleas are irrelevant, and ought to be repelled; and *separatim*, the pursuers are not bound to revive the policy on repayment of the sums sued for, in respect they were induced to pay the said sums to the defender by his misrepresentations, and undue concealment of facts within his knowledge.

After the record was closed, and a proof allowed, Stewart raised an action against the insurance company, in which he pleaded: (1) On the pursuer making repayment to the defenders of the sums mentioned in the summons, the defenders are bound to revive and restore the policy, or issue a new policy to the same effect in favor of the pursuer; or otherwise, the pursuer should be placed in the position in which he would have stood had the payment and discharge condescended upon not taken place. (2) Both parties having been in the *bonâ fide* belief that the policy had become payable, and having transacted upon that understanding with one another, the defenders are not entitled to demand repayment of the sum in the policy, and at the same time to refuse to place the pursuer in the same position in which he stood when the error arose.

The insurance company pleaded: (2) Standing the discharge of the policy the pursuer cannot maintain the present action.

The North British and Mercantile Insurance Company v. Stewart.

(3) The conditions and provisions stipulated in the original policy not having been observed and performed by the pursuer, the said policy has lapsed, and the defenders are not bound to restore or revive the same or to issue a new policy to the same effect. (4) The defenders are not bound to revive the policy on repayment of the sums mentioned in the summons, in respect they were induced to pay the said sums to the pursuer by his misrepresentations and undue concealment of facts within his knowledge.

The two actions were conjoined, and a proof was led.

The lord ordinary pronounced these interlocutors: "28th July, 1870. Finds, that the sum of £1,207 7s. 4d., repetition of which is concluded for in the action at the instance of the insurance company, was paid by them and received by Mr. Stewart as the amount due on a policy of insurance held by the latter on the life of James M'Donald, with some relative sums, on the 19th of December, 1868, when under the mistaken belief that the said James M'Donald was then dead; but that it has been since ascertained, and was admitted by both parties at the debate, that the said James M'Donald is still alive: Finds that, in this state of matters, both parties are entitled to have matters restored as near as may be to the state in which they were before said sum was so paid and received; and appoints the case to be enrolled, in order that these findings may be applied, and judgment pronounced in accordance therewith exhaustive of the cause, and also that parties may be heard on the question of expenses of process."

"29th October, 1870. The lord ordinary having heard parties' procurators with reference to the interlocutor of 28th July last, in the conjoined processes, Finds, that upon the sum of £1,316 8s. 2d. sterling, consigned by Robert Stewart (the defender in the original action) with the Royal Bank of Scotland, as specified in his answers 9 and 10 in said action, being made forthcoming, with all bank interest which shall have accrued thereon, to the North British and Mercantile Insurance Company, and on payment being also made to them by the said Robert Stewart of the sum of £19 16s. 8d. sterling, being the premium mentioned in said action, which fell to be paid on the —th day of May, 1860, with interest on said sum of £19 16s. 8d. from the said —th May last, and till payment, at the rate of £5 per centum

per annum, the said insurance company are bound to grant and deliver to the said Robert Stewart a certificate or policy of insurance, in terms of the second alternative conclusion of the counter action at the instance of the said Robert Stewart against the said company, and accordingly ordains the said insurance company to execute in regular form, and deliver such policy to the said Robert Stewart on payment being made by him to the said company of the foresaid sum of £19 16s. 8d. and interest, and on said completed policy being delivered to the said Robert Stewart grants warrant to, and ordains the Royal Bank of Scotland to make payment of the foresaid consigned sum and interest to the said insurance company, and decerns: Finds Robert Stewart entitled to expenses in the conjoined actions, and also previous to the processes being conjoined, but subject to modification, the extent of such modification to be determined after the taxation of the account: Allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report."

The insurance company reclaimed.

The argument in the inner house turned mainly on whether the proof established misrepresentation and want of good faith on the part of Stewart.

This interlocutor was pronounced: "Having heard counsel on the reclaiming note for the North British and Mercantile Insurance Company against Lord Ormidale's interlocutors of 28th July and 29th October, 1870, adhere to the first interlocutor and recall the second interlocutor of the lord ordinary: Find that the defender, Robert Stewart, is bound to pay to the pursuers the sum of £1316 8s. 2d., consigned by him with the Royal Bank of Scotland, as specified in his answers 9 and 10 in said action, with all bank interest which shall have accrued thereon, and also the sum of £19 16s. 8d., being the premium mentioned in said action which fell to be paid on the 18th day of May, 1870, with interest on said sum of £19 16s. 8d. from said 18th day of May last and till payment, at the rate of five per cent per annum: Find and declare that the policy, No. 6 of process, is a subsisting policy, and has not been forfeited by reason of non-payment of the premium, and that on his making payment of the above sums the said insurance company are bound to redeliver the said policy to the said Robert Stewart as his

The North British and Mercantile Insurance Company *v.* Stewart.

proper writ and evident, and decern: Grant warrant to and ordain the Royal Bank of Scotland to make payment of the foresaid consigned sum and interest to the said insurance company, and decern: Find the said Robert Stewart entitled to expenses," &c.

CANADA.

DOWKER AND ARMOUR *vs.* THE CANADA LIFE ASSURANCE COMPANY.

(24 Up. Can. Q. B. 591. Queen's Bench, 1865.)

Policy void for want of interest. Recovery of premiums. — A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children. *Held*, that such policy was illegal, under 14 Geo. 3, ch. 48, sec. 2, for the name of the person interested therein, or on whose account it was made, was not inserted in it *as such*; and the declaration of trust, which showed that the plaintiffs had no interest, could not be incorporated as part of the policy. *Held*, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a *delictum* on their part, so as to make the maxim "*in pari delicto*," &c., applicable; but that they could recover only the first premium paid, the other payments not appearing upon the evidence to be made by them and their own money. *Held*, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as the basis of the contract.

THE declaration contained the common *indebitatus* counts, to which never indebted was pleaded. The case was tried in May last, at Lindsay, before Adam Wilson, J.

The plaintiffs gave in evidence a policy of assurance dated 18th of March, 1857, executed by the defendants, in which it was recited that the plaintiffs had proposed to effect an insurance in the sum of £1,000 on the joint lives of Henry Mason and his wife, and had delivered to defendants a declaration in writing, setting forth certain matters, which declaration was the basis of the contract; and reciting the payment to the defendants of £21 16s. 8d. as the first (half-yearly) payment, and that the plaintiffs had agreed to pay the residue, and all future premiums. And the defendants agreed to pay £1,000, if the said Mason and his wife, or either of them, should die before the expiration of six months, or if they lived beyond that term, that the plaintiffs should pay the like instalment of £21 16s. 8d. every six months. The policy was subject to certain conditions indorsed thereon. The amount of premiums paid was \$1,353 $\frac{5}{10}$. A declaration of trust was put in evidence, declaring that in case of the death of either Mr. or

Dowker v. The Canada Life Assurance Company.

Mrs. Mason, the plaintiffs would hold the insurance money for the benefit of the survivor, and for the children of Mr. and Mrs. Mason.

The plaintiffs claimed to recover back the money, on the ground that the policy was void, and that they had paid these premiums.

Several objections to the plaintiffs' recovery were taken, which the learned judge overruled, and the plaintiffs had a verdict, with leave to the defendants to move to enter a nonsuit.

In Easter term *Sadlier* obtained a rule calling upon the plaintiffs to show cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved, objecting, —

1. That the policy produced referred to a declaration signed by the plaintiffs and Mason and his wife as the basis of the contract, which declaration should have been produced.

2. That there was no evidence besides the policy to show the terms of the contract, and it should not be presumed that there was no interest in the plaintiffs in the lives of Mason and his wife, or in Mason and his wife in the lives of each other.

3. That Mrs. Mason had an interest in her husband's life, so that the policy was not void *in toto*.

4. The payment of premiums having been made voluntarily, and as the plaintiffs alleged on an illegal contract, cannot be recovered back.

5. There was no evidence to show by whom the premiums were paid, except as to two receipts, which showed one payment by Mason and another by Dowker; and as there was no obligation on the part of the plaintiffs to pay the premiums, payment by them would not be presumed:

Or why the verdict should not be reduced to such sum as the court under the evidence should think proper: that is to say, by the amounts shown to have been paid by Mason and Dowker respectively.

C. S. Patterson showed cause, citing 14 Geo. 3, ch. 48; *Hodson v. The Observer Life Assurance Society*, 8 E. & B. 40; *Shilling v. The Accidental Death Insurance Company*, 2 H. & N. 42;¹ *Bunyon on Life Assurance*, 91; *Add. Con.* 33.

Burton, Q. C., supported the rule.

DRAPER, C. J., delivered the judgment of the court.

¹ *Ante*, vol. 2, p. 428.

The plaintiffs seek to recover back the premiums paid by them upon the policy of insurance put in evidence, contending that it is void, as contrary to the statute 14 Geo. 3, ch. 48. The jury have found in their favor. The defendants move upon leave reserved to enter a nonsuit.

We do not attach any weight to the first objection. It is true that the declaration is stated in the policy to be the basis of the contract, but the plaintiffs are striving to disaffirm the contract, and it is in no way shown that the declaration has any bearing on the objection taken to the policy. The bare fact that it is referred to in the policy cannot render its production by the plaintiffs necessary; and as the policy states that it was delivered to the defendants, it is to be presumed they have it.

The second objection involves the important question, though perhaps only indirectly. The second section of 14 Geo. 3, ch. 48, declares that it shall not be lawful to make any policy on the life of any person, &c., without inserting in such policy the name of the person interested therein, or for whose use and benefit, or on whose account, such policy is made. Admitting for the argument's sake that if the policy alone be regarded, it is not to be presumed that the plaintiffs had no interest in the lives of Mason and of his wife, or that Mason and his wife had no interest each in the life of the other; the difficulty is not met, nor even if it be further admitted that on the face of the policy it might be assumed that the plaintiffs had such an interest.

The objection is the want of inserting the name of the person interested, &c. The plaintiffs put in evidence a declaration of trust, executed by themselves, stating that in case of the death of either Mr. or Mrs. Mason they would hold the insurance money for the benefit of the survivors and of their children. By this evidence it was plainly shown that the plaintiffs themselves had no interest, and that the insurance was in fact for the benefit of the *cestuis que vie* and their children. It was then necessary that their names, at least those of Mr. and Mrs. Mason, should be inserted, and in fact they are both inserted in the policy. But the case of *Hodson v. The Observer Life Assurance Society* (8 E. & B. 40) shows that, nevertheless, the statute has not been complied with. In that case the plaintiff sued upon a policy made in his own name upon the life of Charlotte Weir, and averred in the declaration that the policy was effected for the use and benefit

Dowker v. The Canada Life Assurance Company.

and on the account of Charlotte Weir. The defendants pleaded that her name was not inserted in the policy as a person for whose use or benefit or on whose account such policy was made, setting out the policy in full, which contained a recital that the plaintiff alleged himself to be interested in the life of Charlotte Weir. The court gave judgment for the defendants on a demurrer to this plea, and Coleridge J., remarked that the statute requires that the name of the person interested shall be inserted in every such policy, "inserted, that is, *as* that of the person interested."

If either Mr. or Mrs. Mason had died and these plaintiffs had brought an action on the policy, we do not see why the defendants might not have succeeded on a plea perfectly similar, and the reason would be that the omission renders the policy void for want of compliance with the statute.

But it may be urged that the plaintiffs are proved to have effected this insurance as trustees for Mr. and Mrs. Mason, and therefore it is valid, for if that appears, Mr. and Mrs. Mason are named in the policy.

In *Collett v. Morrison* (9 Hare, 162¹) Vice-Chancellor Sir George Turner held that the statute 14 Geo. 3 does not prohibit a policy being granted to one person in trust for another, where the names of both parties appear upon the face of the instrument. The circumstances of that case must be examined in order to arrive at the ground of the decision. Certain inquiries to be answered by the party desirous of effecting the insurance, formed part of the proposal, and the answers to these formed another part. One inquiry was the name, residence, and description of the party proposing the insurance; and the answer was, "Mrs. Emma Collett, of," &c., "by her trustee, W. J. Richardson, of," &c. This proposal was accepted by the directors of the Britannia Assurance Company. Richardson afterwards signed a second proposal, and the answer to the same inquiry was, "W. J. Richardson, of," &c. The policy began thus: "Whereas W. J. Richardson, of, &c., the person assured by this policy, hath agreed to effect an insurance with the Britannia Life Assurance Company, in the sum of £999, on the life of Emma Collett, of," &c., "and hath caused a declaration or statement in writing to be delivered," &c.

¹ *Ante*, p. 71.

Among the conditions indorsed on this policy was one that in every case where any policy issued by the company shall be at the time of issuing the same, or at any time afterwards become subject to any trust whatever, the receipt of the trustee for the time being for the sum assured by such policy shall, notwithstanding any equitable claim or demand whatsoever of the person beneficially entitled to the policy or sum assured thereby, be an efficient discharge to the company.

The vice-chancellor held that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the party assured, a court of equity will interfere and deal with the case upon the footing of the agreement and not of the policy. And he was of opinion that the evidence established that the directors of the company accepted the first proposal wholly. He treated the policy as if it had been drawn up in the terms of that proposal; *i. e.*, that Emma Collett insured her own life by her trustee Richardson; and he decreed in favor of the plaintiff, who filed the bill after her death as her personal representative. His decision as to the operation of the statute 14 Geo. 3 does not therefore help the policy in this case, which contains not a word to show that the plaintiffs were trustees, and that it was in fact an insurance for Mr. and Mrs. Mason, made by them by or through the plaintiffs as their trustees. If we were at liberty to treat the declaration of trust as the vice-chancellor treated the proposal which had been accepted, and incorporate it as part of the contract of insurance, the policy would no longer be obnoxious to the objection which *Hobson v. The Observer Life Assurance Society* sustains. But in a court of law we cannot rectify the contract, if under the circumstances of the case it would be right to do so.

And though the plaintiffs are seeking to treat the policy as void *ab initio*, and therefore to recover back the premiums, that is nothing to show that the defendants are seeking to establish it, so as to make it binding on themselves. Indeed, one objection urged to the plaintiffs' recovery affirms the plaintiffs' contention that the policy is void, but claims protection under the shelter of the maxim, *in pari delicto*, &c. We think this wholly fails. Not only is there nothing to show that the policy in this case was a gaming or wagering policy; it is not even a case in which none of the parties have no interest in the lives insured. The declara-

tion of trust shows that it was in fact meant to be a policy by Mr. and Mrs. Mason on their joint lives made by their trustees ; and the defect in this instance which defeats the policy is not stating the name or names of Mr. and Mrs. Mason, or either of them, as the person or persons interested in the policy. We do not think this is *delictum*, so as to entitle the defendants to keep the money they have received from the plaintiffs without any consideration, under the shelter of the maxim^e invoked. There has been no *fraud* upon the insurers, nor any commencement of risk.

We think therefore the rule for nonsuit should be discharged. But this is an action for money had and received ; the plaintiffs can only recover their own money, the money they have paid ; and upon the evidence we cannot see that they have paid more than the sum expressed in the policy, and to that sum, being £21 16s. 8d., the verdict should be reduced, thus making the last part of the rule

Absolute.

CONNECTICUT.

ELIZABETH LEMON *vs.* THE PHOENIX MUTUAL LIFE INSURANCE COMPANY & another.

(38 Conn. 294. Supreme Court, 1871.)

Surrender and reissue of policy payable to a third person. — Upon the application of A a policy of insurance upon his life was issued by a life insurance company, for his own benefit. A afterwards surrendered this policy to the company, and at his request a second policy was issued in lieu thereof, similar in all respects to the first, except that it was payable to B, to whom A was engaged to be married. The second policy was by direction of A placed in the hands of C as a depository for B. A afterwards, without the knowledge or consent of B, obtained possession of the second policy, and surrendered it to the company, who cancelled it and issued in lieu thereof a third policy, similar to the others, except that it was payable to D, to whom A was indebted, and intended it as security for such indebtedness. D paid one premium upon the third policy. At the time the second and third policies were issued, A's health was such that he was unable to pass the required medical examination for a new policy. In a bill in equity by B against the company and D, who resided beyond the jurisdiction of the court, and although notified of the pendency of the suit did not appear, praying that the company might be ordered to pay the avails of the third policy to her, and enjoined against paying them to D, it was *held*, that there was an executed gift of the second policy to B; that the consideration for the third policy was the surrender of the second, and that therefore B was equitably entitled to the benefit of the third policy, and was entitled to a decree ordering the avails of it paid to her, less the amount of the premium paid by D.

BILL IN EQUITY, to compel the Phoenix Mutual Life Insurance Company to pay to the petitioner the amount of a policy of life insurance; brought to the superior court and referred to a committee who found the following facts: —

On the 1st of January, 1868, the respondents, the Phoenix Mutual Life Insurance Company, a corporation established by this State, were doing business by their agent in this State and in Canada, and have so continued to do business ever since. On the 9th of January, 1868, George C. Peterson, of Canada, made application to the company, through their agents at Montreal, for a policy of insurance on his life, termed an endowment policy, payable at fifty years of age, or at his death, if earlier. On the 13th of January, 1868, in pursuance of this application, the company issued a policy upon Peterson's life for \$3,000, payable to himself, which was sent to the company's agent at Montreal for his counter signature and delivery to the assured. In November,

Lemon v. The Phoenix Mutual Life Insurance Company.

1868, Peterson applied to the Montreal agents to have his policy changed and made payable to the petitioner, but made no new application, nor did the company ever make any new examination of Peterson, nor was his health such as to enable him to pass the necessary medical examination for a new policy in November, 1868, or afterwards.

The agents wrote to the company on the 24th of November, and immediately, as is supposed after Peterson's request, returning the policy, saying that Peterson "wants a policy payable to Miss Elizabeth Lemon, Stamford, Ontario." The company, on the 27th of November, wrote a new policy payable to the petitioner, bearing the same date and number, and for the same amount as the original policy, which they cancelled. This policy was duly sent to the company's agents at Montreal, where it remained until the 15th of December, 1868. Peterson requested the agents to forward the policy to Charles Lemon, the brother of the petitioner. He also wrote to Lemon that he had done so; and the agents forwarded the policy to Charles Lemon on the 15th of December, 1868. Peterson also informed Miss Lemon of what he had done. Peterson went South for his health, which was failing, starting November 30th, 1868, nor was he able to do business after that time until his death. Lemon received the policy in the ordinary course of the mails, probably on the 16th or 17th of December. On the 16th of December, 1868, Peterson wrote from Aiken, South Carolina, to the agents at Montreal, asking them to have his policy in favor of Miss Elizabeth Lemon changed for his brother, Peter Alexander Peterson, Stamford, Ontario, saying, "After the policy is changed, please return the same to Mr. George P. MacPherson, who will hand you this with the policy." George Peterson sent a letter to Lemon from Aiken, dated December 14th, 1868, saying, "Please send the policy I advised you would be sent to you to George P. MacPherson, Montreal." Lemon sent the policy to MacPherson forthwith, and MacPherson took it to the agents, who sent it to the home office.

The company in January, 1869, on surrender to them of Lemon's policy, cancelled it, and wrote another policy numbered and dated as the others had been, and similar to the Lemon policy, excepting that Peter A. Peterson's name appeared in the place of Miss Lemon's. Miss Lemon had no knowledge of the

Lemon v. The Phoenix Mutual Life Insurance Company.

transfer to Peter A. Peterson, and gave no consent thereto. Charles Lemon had no knowledge of the transfer until after George Peterson's death. Before the first change in the policy, when Peterson had expressed to Lemon his intention of changing it to her benefit, she suggested to him the propriety of giving it to her brother. George C. Peterson died October 19th, 1869, and Peter A. Peterson furnished due proofs of his death to the company. The last policy was found with George C. Peterson's effects. Peter had not seen it until after George's death. Neither Charles nor Elizabeth Lemon made any inquiries about the policy after its change to Peter's favor, during George's life, nor did either of them pay, or take any measures to pay, the premium upon it. Miss Lemon and George C. Peterson promised marriage to each other in 1867, which promise was binding at the time of issuing all the policies. Miss Lemon had no other interest in George's life. Peter A. Peterson advanced money to George to take care of him in his sickness, and went South with him in November, 1868; and George was in Peter's debt in November, 1868, and always afterwards, to a considerable amount, although not to the full amount of the policy. George had the policy changed from Miss Lemon's benefit to Peter's, to secure him for his existing and anticipated debts, intending to make the policy solely beneficial to Peter, who relied upon the policy for his security for his advances. The company were not aware that either of the policies had ever gone out of George's possession when they wrote the one beneficial to Peter. Had they known it, they would have required, in addition to its surrender, a written assignment from Miss Lemon. George paid the two premiums upon the policy, but Peter furnished him the money which he used to pay the second premium. George left a small estate, outside of this policy, not enough to pay his brother's advances.

By the law of Lower Canada, the insured must have an insurable interest in the life upon which the insurance is effected. He has an insurable interest in the life of himself, of any person upon whom he depends wholly or in part for support or education, of any person under legal obligation to him for the payment of money, or respecting property or services which death or illness might defeat or prevent the performance of, and of any person upon whose life any estate or interest vested in the insured depends.

Lemon v. The Phoenix Mutual Life Insurance Company.

Peter A. Peterson, who resided in Canada, was made a party to the bill, and pursuant to an order of court, service was made on him by mail, but he made no appearance. The superior court accepted the report of the committee, and reserved the question what decree should be passed for the advice of this court.

C. E. Perkins, for the petitioner.

Goodman, for the Phoenix Mutual Life Insurance Company.

The opinion of the court was delivered by

SEYMOUR, J. In January, 1868, the defendant issued a policy on the life of George C. Peterson for \$3,000. This was in the usual form of endowment policy, and no question arises upon it.

In November, 1868, this policy was surrendered and cancelled, and at the request of the assured a new policy issued in its place, like the former in every respect, except that it was payable to the petitioner, with whom the assured was under an engagement of marriage.

The leading question in this case is whether the petitioner became the owner of this second policy.

It is not claimed that the mere fact of making the policy payable to Miss Lemon, without more, vested in her a complete title. It is conceded that so long as Mr. Peterson retained it in his own possession he might control it as his own. On the other hand, it is not doubted but that if Mr. Peterson delivered it to Miss Lemon as a gift to her, such delivery would vest in her a complete title.

The difficulty in the case is in determining whether on the facts found the policy may properly be regarded as having been in legal effect delivered to her.

This is so much a mere matter of fact, that the committee should have distinctly found it the one way or the other; but instead of a direct finding we have a special statement of facts bearing on the question, and it is left to the court to decide the ultimate fact by inference from this special statement.

Neither plaintiff nor defendant saw fit to remonstrate against the acceptance of the report of the committee. On the contrary, the report is accepted without objection from either party, and we must dispose of the question as best we may with the light we have.

1. The fact that Mr. Peterson caused the policy to be made payable to Miss Lemon indicates a settled purpose in his mind

that she should have the benefit of it; and his acts immediately after will naturally be construed as intended to carry out such purpose.

2. When, therefore, the policy is by Mr. Peterson's order sent to Miss Lemon's brother, we naturally regard it as sent to him *for her*, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself.

3. It appears from the committee's report that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother.

4. After the policy was changed and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done.

Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her.

In December, 1868, Mr. Peterson changed his mind in regard to this policy, and obtained possession of it from Mr. Lemon. By what means, does not distinctly appear; but the committee's report gives no countenance to the idea that it was by fraudulent means, as charged in the bill. It does however appear, that the possession was obtained without the petitioner's consent, and also that she had no knowledge of the second change of the policy, now to be spoken of, until after Mr. Peterson's death.

In January, 1869, Mr. Peterson, having, as before stated, obtained possession of policy No. 2, caused it to be surrendered, and a new one, No. 3, to be issued in its place, payable to Peter A. Peterson, a brother of George.

George went South for his health, which was failing, starting November 30, 1868, and he was not able to do business after that time till his death, October 19, 1869. His health was not such as to enable him to pass the necessary medical examination for a new policy in November, 1868, or afterwards.

Upon these facts, it is clear that the consideration for policy No. 3 was the surrender of policy No. 2. Mr. Peterson's health was such that No. 3 would not have been issued if the defendant had not been bound by No. 2; and inasmuch as policy No. 2 belonged to the petitioner, it was her property that, without her

consent was used to procure No. 3. She is therefore equitably entitled to the benefit of this policy.

Mr. Peterson's money, however, to the extent of the premium paid in January, 1869, is represented in policy No. 3, and to that extent Miss Lemon has no interest, and from the \$3,000 due on the policy, the amount of that premium and interest on it, should be deducted, and the balance paid to the petitioner.

The question was made before us that Miss Lemon had not an insurable interest in Mr. Peterson's life. If she had undertaken to obtain, and had herself obtained, an insurance on his life, that question might have arisen; but surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it; and we know of no law to prevent him from making the policy payable, in case of his death, to the person to whom he was affianced; and if such policy is delivered as a gift to the party to whom payable, we know no law to prevent such gift from being effectual. In *Rawls v. American Life Insurance Company*, 27 N. Y. R. 282,¹ Judge Wright says: "If the contract is with the party whose life is insured, he may have the loss payable to his own representatives, or to his assignee or appointee." Besides, the defendant treated policy No. 2 as valid. It appears that policy No. 3 was issued in consideration of the surrender of No. 2, as before stated, and the question now to be decided is, not on the validity of No. 2, but whether Miss Lemon has an equitable interest in No. 3.

The defendant also claimed that the petitioner ought not to have judgment in her favor, while another is claiming the money by the terms of policy No. 3.

We appreciate the difficulty of the defendant's situation, exposed as he may be to a suit by Peter A. Peterson. If the defendant had brought a bill of interpleader, in Canada or elsewhere, before a court having proper jurisdiction this case would probably have been continued to await the result. But no bill of interpleader has been brought, and upon the pending bill if the petitioner shows herself entitled to the insurance money, we must decree it to her, notwithstanding the possibility that upon a suit by Peter A. Peterson the facts may appear otherwise than they do to us.

¹ *Ante*, vol. 1, p. 558.

Lewis v. The Phoenix Mutual Life Insurance Company.

The petitioner has done all she could to make Peter A. Peterson a party to this bill. He has been notified of its pendency, and has had an opportunity to appear and show his title if he has any. He evidently chooses not to enter an appearance. We are not called on to say what effect, if any, these circumstances would have upon any suit which he may bring against the defendant, either here or in another jurisdiction.

We advise the superior court to pass a decree in favor of the petitioner, to the extent and in the manner above specified. We ought, however, to say that it has not escaped our attention that the bill is not in its allegations precisely adapted to the facts as found by the committee, nor precisely to the grounds upon which relief is granted; but no point was made by the defendant on this account, and if any question had been made we probably should have advised, as has been done in similar cases, that the bill be amended to correspond with the case as shown by the report of the committee.

In this opinion the other judges concurred, except CARPENTER, J., who dissented.

WILLIAM B. LEWIS *vs.* THE PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(39 Conn. 100. Supreme Court, 1872.)

Fraud. Insurable interest. Return of premiums. — The defendants, through R. their local agent, issued a policy of insurance for \$10,000 on the life of L., a brother of the plaintiff, for the benefit of and payable to the plaintiff. By a secret arrangement between R. and the plaintiff, R. advanced \$525 toward the payment of premiums, and agreed to advance the subsequent premiums, the amounts so advanced to be refunded by the plaintiff; and it was further agreed that R. should assume the policy, if requested by the plaintiff, within three years, and refund to him the amount of premiums paid by him with interest, and should receive \$1,000 of the sum insured, if paid by the defendants, in case L. should die within three years. L. did not know of the existence of the policy, and was not examined by a physician as the rules of the defendants required, and the plaintiff had no interest in his life except such as arose from the relationship between them. The defendants were ignorant of all these facts. In the application for insurance the plaintiff stated that he had an interest in the life of L. to the full amount of insurance applied for. The defendants having cancelled the policy, in an action to recover the amount of premiums paid, it was *held*: (1.) That the transaction between the plaintiff and R. constituted a fraud upon the defendants, to which the plaintiff was a party in contemplation of law, and that the defendants could take advantage of the fraud as well against him as against R., although the plaintiff did not actually participate in the fraudulent intent. (2.) That the mere relationship between the plaintiff and L. was not such an interest as would support the policy, but that the policy was *primarily*

Lewis v. The Phoenix Mutual Life Insurance Company.

facie valid, and could only be avoided by showing by parol evidence such want of interest against the defendants. (3.) That the responsibility assumed by the defendants, and the risk and inconvenience to which they were exposed by the acts of the plaintiff, constituted a consideration for the premiums paid.

ASSUMPSIT for money had and received, to recover the amount of premiums paid upon a life insurance policy; brought to the court of common pleas, and tried on the general issue closed to the jury, before Pardee, J. The jury returned a verdict for the plaintiff, and the defendants moved for a new trial for error in the charge of the court. The case will be sufficiently understood from the opinion.

Baldwin, in support of the motion.

Ingersoll & Munger, contra.

CARPENTER, J. We shall pass over the question of jurisdiction, and some of the minor points discussed in this case, for the reason that the view we take of the law upon the conceded facts practically disposes of the case upon its merits. The following facts do not seem to have been disputed. George L. Remington was the accredited local agent of the defendants. Through his agency the defendants issued a policy for \$10,000 on the life of Thomas Lewis, for the benefit of, and payable to the plaintiff, a brother of said Thomas. By a secret arrangement between Remington and the plaintiff, Remington had a personal interest in the policy. In case Thomas Lewis should die within three years, he was to have \$1,000 of the sum insured if paid, and obligated himself to take the policy off the plaintiff's hands, if he so elected, at any time within three years, and refund to him the amount paid thereon with interest. In consideration of this Remington paid \$25 of the first premium, and advanced the further sum of \$500, allowing the plaintiff to refund in monthly instalments of \$50 each, without interest, and agreed to advance the subsequent premiums, to be refunded in like manner with interest. The plaintiff had no interest in the life of his brother except such interest as arises from the relationship existing between them. Thomas Lewis did not know of the existence of the policy, and was not examined by a physician as the rules and regulations of the company required. The defendants were ignorant of these facts, and also of the fact that the plaintiff had no insurable interest in the life of his brother. Nor does it appear that the defendants had any knowledge of the terms of the contract between

the plaintiff and Remington. The defendants afterwards cancelled the policy, and the plaintiff brings this suit to recover the premium paid.

From these facts it will be seen that Remington in negotiating the policy acted for himself, and at the same time, and in the *same transaction*, acted as agent for the defendants. Not only so, but he involved the company in a contract, without their knowledge, by which he, a stranger to the party whose life was insured, might have an interest to the extent of \$10,000 in the death of that party. All these facts were within the knowledge of the plaintiff. It will not be contended that any well conducted life insurance company, knowing the facts, would issue a policy under such circumstances. It requires no argument to show that the tendency of such a transaction is to defraud the company. It was not a legitimate transaction in life insurance, at least so far as Remington's interest in it was concerned, but was clearly a wagering policy, a mere speculating adventure, a contract forbidden by statute and by the policy of the law. The law not only refuses to enforce such a contract, but will decline to aid a party, knowingly entering into it, in recovering money paid in pursuance of it from the party upon whom the fraud was attempted to be practised. In view of the facts in the case, the defendants asked the court to charge the jury, that the contract and the policy issued upon it were against public policy, illegal, and a fraud upon the defendants. The court charged the jury that if there was fraud in fact, or fraud in intent, which fraudulent intent was participated in by the plaintiff, he could not recover, and that the defendants could not take advantage of any fraud on the part of their agent, unless that fraud was participated in by the plaintiff.

It must be remembered that the defendants were the principal party liable to suffer from Remington's fraud. The plaintiff was a party to the contract, and he, if any one, expected to derive some benefit from it. All the facts and circumstances which constituted the fraud were within his knowledge. He was therefore in contemplation of law a party to the fraud, and the defendants can take advantage of it as well against him as against Remington, and the jury should have been so instructed. The mere fact that he was ignorant of the legal effect of the transaction is not sufficient to exonerate him from the legal consequences of the

Lewis v. The Phoenix Mutual Life Insurance Company.

fraud. "Fraud," said the late Chief Justice Storrs, "is *cheating*." The instruction given led the jury to believe that the plaintiff could not be affected by the fraud, unless he actually *cheated*, or intended to *cheat*, whereas the law stamps the transaction as fraudulent, and imputes an intention to defraud to all parties who knowingly and wilfully engage in it. Remington's want of good faith to his principal tainted the whole contract. In this respect there is no ground for distinguishing between his and the plaintiff's interest in the policy. To test the matter: suppose Thomas Lewis had died during the year, and in a suit upon the policy all the facts had come to light. Would any lawyer have contended that the plaintiff could recover to the extent of his interest in the policy, \$9,000, leaving the fraud to operate only upon Remington's interest? Why not, if the fraud does not affect the plaintiff? Again: suppose in such a suit the defendants should defend successfully. Could the plaintiff then sue for and recover the premium? Why not, if the doctrine of the court below is correct? Why not, if the plaintiff can recover in this action? To carry the illustration one step further: suppose the plaintiff in an action on the policy could recover; then the plaintiff encounters another difficulty, to wit, there was a good consideration for the premium paid, and therefore he would not be entitled to recover in this action.

It will not do to say, as the court intimates in this part of the charge, that the fraud of Remington was the fraud of the defendant's agent. As to this transaction Remington was not their agent, but was acting outside the scope of his agency. Although nominally representing the defendants, he was in reality acting for himself and the plaintiff. So far as he was in fact an agent, he was the agent of the plaintiff. In any aspect in which this question may be viewed, we are unable to see why the fraud is not fatal to the plaintiff's claim.

The plaintiff further contends that the policy never was an operative instrument, for the reason that he had no insurable interest in the life of his brother, and therefore there was no consideration for the premium paid, and that on that ground he is entitled to recover. The court charged the jury, in opposition to the claim of the defendants, that the plaintiff had no insurable interest, and that he was not estopped under the circumstances from showing his want of interest.

We think it is a correct legal proposition, that the mere relationship of a brother is not such an interest as will support a policy of life insurance. The interest required to make such a contract valid must be of a pecuniary nature. A few cases will be cited by way of illustration. A father, being entitled to the wages of his minor son, has an insurable interest in his life. *Loomis v. Eagle Life Ins. Co.* 6 Gray, 396.¹ A sister, dependent upon a brother for her education and support, has an insurable interest in the brother's life. *Lord v. Dall*, 12 Mass. 115.² A person advancing money to another, in consideration of which he acquires an interest by contract in his future services, may protect that interest by an insurance on his life. *Bevin v. The Conn. Mut. Life Ins. Co.* 23 Conn. 244.³ From these and many other cases that might be cited, it is apparent that the plaintiff might have had an insurable interest in the life of his brother. He might have been dependent upon him for his support. He might have had a fixed pecuniary interest in his future services. He might have been a creditor. The defendants could not know from the application that the plaintiff did not have a pecuniary interest in the continuance of his brother's life. The policy therefore on its face is not void, but *primâ facie* valid, and could only be avoided upon proving, by parol evidence, a want of interest. Assuming that fact to be proved, we think the court was correct in its instruction upon this point.

But we think the court erred in instructing the jury that the plaintiff was not estopped from showing his want of interest. The application contained the distinct interrogatory, whether he had "an interest in the life to be insured to the full amount now applied for?" He answered unequivocally "Yes." He was not deceived or misled by Remington in respect to any fact involved in the matter. They were all well known to him. The advice given by Remington upon a legal point, to wit, that the relationship of blood created an insurable interest in the life of Thomas to support the policy, cannot have the effect to excuse him for the misrepresentation. The plaintiff, as well as Remington, is presumed to know the law. He knew all the facts, and was bound to answer correctly. The relationship clearly appeared from an answer to a preceding interrogatory. That affords a strong pre-

¹ *Ante*, vol. 1, p. 175.² *Ib.* p. 154.³ *Ib.* p. 19.

Lewis v. The Phoenix Mutual Life Insurance Company.

sumption that the question relating to interest had reference to something aside from relationship. Considering the interest which Remington had in this policy, and the peculiar circumstances attending the transaction, we think it was the plaintiff's own folly to rely upon his declaration that the relationship constituted a sufficient interest. Under the circumstances, that declaration can in no proper sense be regarded as the declaration of the defendants, nor is it such an act of their agent as will be binding upon them.

The question then recurs whether the defendants have acted upon the answer to this interrogatory in such a manner as to estop the plaintiff from showing its falsity. The principles which govern the application of the doctrine of *estoppel in pais* are too well known to require repetition here. Had the answer stated the facts, the presumption is that the defendants would not have issued the policy. Presumptively then the answer given induced the defendants to enter into this contract. But the plaintiff says they are not thereby prejudiced, because, the policy being void, they in fact incurred no liability. The answer to that is that the policy is not void upon its face. The facts which render it void could only be ascertained upon inquiry and investigation. If, by the death of the insured, the policy had become payable during the year, such an investigation might not have been made; or, if made, might not have been successful in bringing to light the facts. Remington's interest in the policy would naturally lead him to make such representations as to throw the defendants off their guard, and induce them to pay the claim. That certainly was a risk which the defendants assumed. Again, it would have been the right of the plaintiff to insist upon a judicial investigation. Had a suit been brought on the policy, the defendants would at least have incurred the expense and hazard of a law suit, with \$10,000 at stake, and the usual uncertainty as to the result. The plaintiff therefore by his words and conduct intentionally caused the defendants to believe that he had an insurable interest in the life of his brother, and induced them to act upon that belief so as to change their own previous position, and assume a responsibility which they would not otherwise have assumed, and he is now concluded from averring against the defendants a different state of things.

But again, the responsibility assumed, and the risk and incon-

venience to which the defendants were exposed, of themselves constituted a consideration for the premium paid, which perhaps was a sufficient consideration, if not in all respects an adequate one. At all events the plaintiff took his chances of a favorable result, and the year had nearly expired before the true character of the transaction was discovered. After the discovery, and after it was apparent that the enterprise was a failure, the plaintiff attempted to rescind the contract and recover back the money paid. There is no equity in his claim, and if he recovers at all it must be in obedience to some inflexible principle of law.

The record presents other questions which involve important principles. But as we are not prepared to decide them without further discussion and consideration, we pass by them, believing that they will not be material in another trial of this case.

A new trial is advised.

In this opinion the other judges concurred.

GEORGIA.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, plaintiff in error, *vs.* CATHARINE A. PATERSON, defendant in error.

(41 Ga. 338. Supreme Court, 1870.)

Misrepresentation. Reputed wife.—Where one as the agent of his reputed wife represented to an insurance company that she was his wife, and effected an insurance upon his own life in her name, as her agent, and for her benefit, and the truth was that the marriage was void by reason of the reputed wife having a lawful husband living at the time of the second marriage. *Held*, that the policy was not void by reason of the illegality of the last marriage, unless it farther appeared that at the time the policy was effected the said reputed husband and wife knew that at the time of their alleged marriage the lawful husband of the wife was living, and failed to inform the company of the fact.

Interest.—The reputed wife, being treated and supported as wife, had an insurable interest in the life of the deceased.

Suicide. Mistake.—In the policy in question, there was a provision that the company should not be liable if the assured should die by his own hand. *Held*, that if the assured drank to intoxication, and, while in this condition, by accident or mistake, took an overdose of laudanum and died therefrom, this was not a dying by his own hand in the sense of the policy, even though the mistake or accident were in some sense occasioned by the drunkenness. But if the deceased took the laudanum with intent to destroy his life, it was immaterial that he was drunk at the time, and the policy was avoided.

THE plaintiff, Catharine A. Paterson, averred that on the 26th of February, 1867, she caused to be made a policy of insurance by the Equitable Life Assurance Society of the United States, by which the society assured the life of her husband, James F. Paterson, in the sum of \$10,000, for her sole use, with participation in profits during his life. Among the stipulations in the policy were these: that it should be void “if the assured shall die by his own hand within two years from the date of said policy;” “or if the declarations made in the application for said policy, or if any statement respecting the person or family” of the assured “should be found in any respect untrue.” On the 16th of May, 1868, the assured died, of which due notice and proof were furnished.

The society pleaded the general issue; that in said application Paterson was represented as a married man, whereas he was not; that plaintiff was not Paterson’s wife, as was therein stated, but was the wife of one John H. Talbird, but had undertaken to

marry Paterson, and was living with him under such circumstances as that, had they been fully disclosed, the policy would not have been issued, yet that she and Paterson fraudulently concealed these circumstances from the society ; that on the 11th of December, 1863, she and Paterson had procured the passage of a private act, relieving them from the penalties of marrying while said Talbird was alive, representing that they then supposed him to be dead, and yet this also was fraudulently concealed from said society ; that she had no interest in Paterson's life ; and that had the fact been known the policy would not have been issued. Further, she was faithless to Paterson, and thereby drove him to desperation, and that he had determined to separate from her, consulted counsel, and was in the act of such separation just before his death. Further, Paterson took poison from some person unknown ; his death was by poison, which she knew he had taken voluntarily ; and yet, being present and intending to let it have full effect, she refused and neglected to call medical aid, whereby his death occurred. That in fact she assisted him in taking the poison, and administered it to him.

On the trial the plaintiff read in evidence the policy, drawn in favor of "Katie A. Paterson, wife of" the assured ; the certificate of a minister showing her marriage with Paterson in 1860 ; and she showed by a witness that Paterson had introduced her to him (witness) as his wife.

The defendant's agent, who had issued the policy, testified that the policy was based upon the application shown to him, and that, had it been known that plaintiff and Paterson did not sustain to each other the legal relation of husband and wife, the policy would not have been issued. .

Cross-examined, he said : " I first heard doubts expressed as to whether Dr. P. and plaintiff were husband and wife after the death of the former. If I had known that such doubts existed at the time of the issuing of the policy, I might, or might not, have recommended it to issue. The company, in my opinion, would not have issued it. I do not know the laws of Georgia as to what constitutes the legal relation of husband and wife. The company so far recognized my acts as generally to issue the policy on my recommendation ; but they would correct any errors. As a general thing, they acknowledge as binding what I do. I canvassed Dr. Paterson heavily to induce him to take out the policy."

The application was then put in evidence. It contained the following stipulation: "The undersigned, whose life is herein proposed for assurance, hereby declares that the answers to the questions herein are fair, full, and true answers to said questions, and it is distinctly stipulated and agreed by said applicant that the said answers and the statements herein shall form the basis of the proposed contract of assurance, and that any untrue or fraudulent answers or statements, any suppression of facts respecting his (or her) health or family history, or neglect to pay the premium on or before the day it becomes due, shall render all policies issued under or by reason of this application, and all dividends thereon, null and void, and forfeit all payments made thereon."

It contained also the following questions and answers by James T. Paterson:—

"5. Are you married? Yes. Have your habits of life always been correct and temperate? Yes."

"10. What is your custom respecting the use of ardent spirits, malt liquors, or wine? Use them very rarely."

"20. What is the relationship or interest in you of person named? Wife."

And the following question and answer in the medical examiner's report:—

"11. Do you believe the person to be entirely sober and temperate in his habits of life? They are."

And the following in certificate of friend:—

"2. Are his habits of life entirely correct and temperate? Yes."

"Are his habits and health such, in your opinion, as to render his life safely assurable. Yes."

The application was signed at Savannah by "James T. Paterson for Katie A. Paterson."

It was proved that the plaintiff and Talbird had parted in Alabama in 1859; that Talbird had gone away and was reported dead; but facts were stated tending to show that the report was fabricated and given currency by the plaintiff and Paterson; and it was proved that Talbird was living after the alleged marriage of the plaintiff and the assured.

It was shown that Paterson died from the effects of laudanum taken about midnight, that no physician was called in till about eleven o'clock on the next morning, and that he died about noon.

The circumstances as detailed by the plaintiff, her conduct at the death, at the burial, and afterwards, Paterson's declaration that she was unfaithful to him, and that he had quitted her on the day before the death, and that he returned only to get something which he had left, &c., were put in evidence to show that she either gave him the laudanum or suffered him to take too much, and carelessly or wickedly prevented medical assistance till his death from the laudanum was inevitable. It was shown that she had been indicted for the murder of Paterson; and circumstances to prove that she was faithless to him with one Roher and with others were shown. In rebuttal, other witnesses testified as to the manner of the plaintiff and circumstances, to relieve her from the suspicion of carelessness, wickedness, or unchastity towards Paterson. The plaintiff testified to facts tending to show her perfect innocence, that the laudanum was taken by accident when Paterson was drinking, and weak, nervous, and sleepless. She produced letters from Paterson, in which he had addressed her tenderly as his wife; and she stated that she did believe that Talbird was dead when she married Paterson, and that her belief was founded upon circumstances detailed by her, and not of her making. It was shown that the indictment against her was *not proved*. Roher explained his connection with the parties, and said Paterson was drunk the night before he died; but there was evidence that he was a temperate man.

The jury found a verdict for the plaintiff for the amount of the policy, with interest.

The defendants now moved for a new trial on the following grounds:—

1. Because the court erred in charging the jury that “the marriage of one already married is valid until a judgment of divorce is granted.”

2. In charging the jury that “whatever may have been the criminal consequences to the plaintiff for contracting this second marriage,” yet that “if they should find, under the testimony, that Paterson and herself were united in marriage and lived together as man and wife, there was no misrepresentation on the part of Paterson which would avoid the policy.”

3. In failing to charge the jury as requested that “any concealments or misrepresentations as to the true character of the relationship” existing between Paterson and the plaintiff “which

in anywise affected the risk of the insurer, avoided the policy." "That the language of the policy incorporated into itself the application upon which it was based, making all the statements of the latter covenants of warranty upon the part of the plaintiff that they should be in all respects perfectly true; and that, if the evidence shall have shown any misstatement whatsoever, or any suppression of a qualifying fact in the application, whether affecting the risk or not, the policy was made void thereby, and they (the jury) must bring in a verdict for the defendant."

4. In refusing to charge the jury that "if they should find that Dr. Paterson took the poison by mistake, the mistake originating in a mind enfeebled or beclouded by drink, and leading him to pour out laudanum by a dim gas-light into a goblet in such quantity as to produce death, he was guilty of gross negligence, and the plaintiff cannot recover."

5. In not charging as requested that "if the jury should be satisfied from the evidence that there was a conspiracy between the plaintiff and Edward A. Roher, or any other person or persons, to secure the payment of the insurance money, whether by destroying the life of Paterson or by concealing the real causes or significant circumstances of the death, or by any act or declaration looking to any circumstances or relationship in life of the plaintiff, whether existing before or after the undertaking by her to contract marriage with Paterson, then all the acts and declarations of such other person or persons looking to that end are to be regarded as the acts and declarations of the plaintiff herself." That his honor erred in limiting his charge upon that point to conspiracy between Roher and the plaintiff to take the life of Paterson.

6. In not charging the jury as requested that "if the jury be satisfied that the plaintiff has been guilty of gross negligence, either by herself or by her agents, she cannot recover upon this policy, even though they (the jury) should recognize no evidence of criminality in her or her agents."

7. In charging the jury that the plaintiff could take out a policy in her own name upon the life of James T. Paterson; in other words, that a wife can take out a policy in her own name, without other insurable interest, upon the life of her husband, under the Code of Georgia.

8. In re-charging the jury concerning the effect of drunkenness at their request, and in responding to counsel in their presence.

9. Because the verdict was contrary to law.

10. Because it was contrary to evidence.

The court refused a new trial, and the case was now carried to the supreme court.

Jackson, Lawton & Bassinger, for the plaintiff in error.

Loyd & Hartridge & Chisolm, for the defendant in error.

MCCAY, J. The law prohibiting the insurance of a life by another who has no interest in the continuance of that life is founded in a sound public policy. It is intended to prevent gaming policies, and to avoid that inducement to crime which would exist if it were permitted. *Bunyon on Life Ins.* 10, 15; *Rev. Code*, § 2776.

We do not think, however, the case at bar comes within the reason of the rule. We cannot, it is true, agree with the court below that a marriage, where one of the parties has a lawful husband or wife living, is a legal marriage for all civil purposes until it is set aside. Our Code, sections 1698 and 1701, declares such a marriage void. Nor is it by our law a ground of divorce. At any rate it is not among the grounds enumerated in section 1711 of the Code. Whether our courts might not entertain a proceeding to have such a marriage declared void, it is not necessary to discuss.

It is true, that under our law, whilst such a marriage is void, the children born before the commencement of a prosecution are legitimate, notwithstanding the invalidity of such marriage. *Revised Code*, § 4457. It is true, also, that a man holding out a woman as his wife is bound for her acts as though she were his wife. But this holds even if there be in fact no marriage. The most that can be said is, that, for *some* purposes, the law treats the marriage as existing. But these are purposes referring to the rights of others, and not to the rights of the parties themselves. As respects the parties and their rights we do not know of a particular in which such a marriage is otherwise than void. Surely the wife is not entitled to dower and a year's support, &c., &c.

By the common law a marriage between two persons, where one was under a previously undissolved marriage, is absolutely void, and thus did not require a sentence of divorce. *Shelford*, 223, and cases cited. Certain canonical disabilities rendered a marriage *voidable* — as consanguinity, affinity, bodily infirmity, &c. In these cases a sentence declaring the marriage void was

necessary. Shelford, 223. To this class may, perhaps, be added pre-contract. *Case of Anne Boleyn*. But impediments to marriage, such as idiocy, former marriage, &c., which existed at law, made the marriage void. Poynter on Marriage, 84.

The existence in England of two courts, — ecclesiastical and common law, — one administering the canon and the other the common law, kept these distinctions very clear. Here, where we administer by one court both laws, it is necessary to preserve the distinction, since it is founded in the nature of things, and in the law of morals.

But though such a law is void, and may be so treated in any court where the facts are made apparent, we do not see that it follows that a policy of insurance, effected by the husband on *his own* life, in the wife's name and for her benefit, is void.

We do not think such a policy comes within the reason of the law prohibiting gaming policies, nor that it is open to the other objection that it offers inducement to crime. In this case, though the marriage was illegal, yet in *fact* the woman had an interest, and a deep interest, in the life of the husband. He treated her as his wife. He supported her as such; she passed in society as such; and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection after he should himself be dead. Here is no gaming, since the very person whose life is insured is himself the actor in the transaction. So too as to the temptation to crime, offered to the beneficiary of the policy. It would seem when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may, as a general rule at least, be left to *his* discretion.

In Massachusetts (12 Mass. 115 ¹) it has been held that a sister may insure the life of her brother if she be actually dependent upon him. And the New York cases (22 Barb. 39, ² and 20 N. Y. 32 ³) established that an insurance effected by one on his own life for the benefit of a third person, (and that is in substance this case,) is good, since the idea of wager in such case is absurd.

Our statute merely requires the person insuring to have an in-

¹ *Lord v. Dall*, ante, vol. 1, p. 154.

² *Valton v. National Life Assur. Soc.*, ante, vol. 1, p. 409.

³ *Ib.* p. 436.

terest. Code, § 1776. Another section of the Code, 2778, expressly permits the insured to direct the money to be paid to his assignee; and if he may do this, we do not see that an insurance effected by him as the assured of another, for that other's benefit, is not equally good. We do not think, therefore, that this policy is void simply because the marriage was illegal.

But the utmost good faith is required in such cases. The applicant is bound to state every material fact in his knowledge. Sections 2671 and 2672 of our Revised Code, and 2670 of the same, contain these distinct propositions: 1st. That any variation from the truth by which the nature, extent, or character of the risk is affected, will avoid the policy. 2d. If the party acts *bonâ fide*, and states what he thinks is the truth, this does not make the policy void, but the wilful concealment of a fact which enhances the risk does do so.

To apply these principles to this case, it is clear to us that the court erred in his charge to the jury. He told them that Paterson's failure to inform the company of the true relations between himself and the defendant in error was not such a false representation as avoids the policy. We think this depends entirely on whether Paterson knew at the time what the true relations were; if he did not know, then he acted *bonâ fide*, and under section 2761 of the Code the policy is good. But if he did know, and kept back the truth, then, under section 2762 of the Code, the policy is bad.

We think the legality of the supposed marriage was a material fact. It affected the character of the risk. No man observant of human conduct can fail to have noticed that disturbance in one's marital relations is, of all things, most calculated to create mental and physical unhealthiness; and no prudent company would be so ready to take the risk of a man's life whose condition was that of Paterson as it would had the marriage been legal. The history of these parties is itself a striking commentary of the idea we intend to convey. Very clearly Mrs. Paterson, as she is called, knew that her last marriage was illegal; and very clearly, her knowledge of the looseness of the tie that bound her to Paterson influenced her conduct in her relations to him, and in her daily associations with others. Add to this the impending fear of discovery, social ostracism, and the consciousness that, at any moment, as with a petard, the whole fabric of

The Equitable Life Assurance Society of the United States v. Paterson.

her present domestic relations was subject to be scattered to the winds, and, under such circumstances, it is surely true that there are many influences unfriendly to health, and many conducive to the formation of habits, and the indulgence in practices, calculated to shorten life.

We do not say that Paterson was aware of the illegality of the marriage ; that is for the jury to determine on the proof. What we mean is, that if he was aware of it and concealed it, he kept from the company facts entering materially into the nature and extent of the risk, and that concealment, wilful and intentional as it was, and of facts contrary to the truth of the case, avoids the policy.

Very clearly to our minds, a death by accident does not come within the description of dying by his own hand. There must be an *intent* to commit suicide. Even though it be but the intent of a drunken man, however it is none the less an intent.

We think, taking all the charge together, the court properly put the law upon this point to the jury, though it was somewhat obscured by the mode in which the charge was made. An accident, even though it be the result of that loss of perception produced by drink, cannot fairly be called the product of intent. But if the intent in fact exists, the other fact that the man was maudlin from drink, and could have no intelligent conception of his surroundings, does not help the case, since the drunkenness is his own act, and society would be in great danger if one could escape the consequences of his acts by the plea of drunkenness.

Judgment reversed.

Note. — Another point, raised by the facts of the case but not noticed by the court, is not without importance, namely, whether a person insuring his own life for the benefit and as *agent* of another who has no interest in the life assured, can affect a valid policy. If the person for whose benefit the policy is written pays the premium and is the real principal, while the insured is but his mere agent in effecting the insurance, it would seem that the former should have an insurable interest in the latter. The insured in such case does not himself insure his own life; the beneficiary insures it. See *Wainwright v. Bland*, 1 Mees. & W. 32 ; *S. C.*, *ante*, vol. 2, p. 250.

ELIZABETH L. SULLIVAN, plaintiff in error, *vs.* THE COTTON STATES LIFE INSURANCE COMPANY, defendant in error.

(43 Ga. 423. Supreme Court, 1871.)

Parol evidence. Declarations.—In a suit on a life insurance policy, parol declarations made by the agent of the company prior to the execution, delivery, and acceptance of the policy, cannot be received to vary or contradict the terms of the written contract, in the absence of any allegation and evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties.

MRS. SULLIVAN sued the Cotton States Life Insurance Company on a policy on her husband's life. The defence was the non-payment of premiums. On the trial, she proved the following facts: On the 16th of October, 1869, her husband and she applied to the agent of said company for a policy for \$1,000.00 to be paid to the survivor of them at the death of the other. He paid this agent part of the principal [premium?], and on the 25th of October, 1869, the policy was signed and delivered by W. J. Magill, another agent of the company, by mail. The policy was in consideration of the statements in said application, and "of an annual payment of fifty-eight dollars and four cents, to be paid on or before the 25th day of October in each and every year from the date of and during the continuance of this policy; which annual payment is to be paid in manner following: an annual loan of twenty-nine dollars, and a cash semi-annual premium of fourteen dollars and eighty-one cents, to be paid on the 25th day of October and April." For these considerations the company assured their joint lives for \$1,000.00, during their joint lives, subject to the conditions in the policy set forth, and promised "to pay, if this policy should not be previously terminated, the said sum insured, (the balance of the year's premiums on this policy, if any, and also all notes or credits for premiums thereon, and other indebtedness of the insured to this company being first deducted,) to the surviving one of said parties, or his or her executors, administrators, or assigns, on the 25th day of October, 1910, or if the person whose life is hereby insured shall die" sooner, then in sixty days after due notice, &c. The conditions upon which this policy was to be void, were self-destruction, &c., &c., and "if the premiums on this policy shall not be paid at the times above mentioned, and the interest on one note or credit for premiums on this policy, paid annually in advance to the company or its authorized agents."

Sullivan v. The Cotton States Life Insurance Company.

Mrs. Sullivan's interrogatories had been taken. In them she testified that said agent visited her husband, importuned him to insure, and they agreed to insure; made said application, and, in pursuance of it, the policy was sent by mail some ten or fifteen days thereafter. She testified that when asked, "What would be the consequences if the money was not paid up regularly to the day?" the agent replied, that "it would make no difference if the money was paid up in a short time after the day due, if paid as soon as convenient afterwards." Sullivan also asked him where the money was to be paid. The agent replied, that he thought he would make an agent in McDonough to receive the payment, and that he would notify Mr. Sullivan in time to whom to make the payment. The court ruled these sayings of the agent to be inadmissible against the company. She testified further, that when the letter below mentioned was received, her husband was violently ill; the letter was laid aside unopened, and he continued too sick to attend to any business till he died, on the 7th of May, 1870, near McDonough, where they lived. The letter came on the 28th of April, 1870. After his death the letter was opened. It was as follows:

"COTTON STATES LIFE INSURANCE COMPANY OF MACON, GA.,

"Atlanta, 20th July, 1870.¹

"T. M. SULLIVAN, Esq. — Dear Sir: Your premium was due on the 25th day of April. Please remit the amount without delay, and oblige, your's truly,

"W. J. Magill,

"By W. P. Magill."

This letter was offered in evidence, but the court rejected it, saying it did not bind the company. The plaintiff's counsel then examined said Magill, who testified that he was superintendent of the agencies of the company; that said letter was written by his clerk, whom he had directed to send a circular "dun" to all policy holders whose premiums were overdue; that the company had notice that Sullivan was dead, but he supposed W. P. Magill forgot that fact when he wrote said letter; that the company is accustomed to receive overdue premiums and let the policy stand, if they are paid in a few days after due; but never after thirty days have expired from the time they are due, unless after re-examination of the assured.

Here they again asked to be allowed to read that part of Mrs. Sullivan's interrogatories which had been ruled out. The court refused to allow it. Plaintiff closed, and the court granted a nonsuit.

George M. Nolan, S. C. McDaniel, M. Arnold, for plaintiff in error.

George W. Bryan, J. D. Stewart, by *C. Peebles*, for defendant.

WARNER, Judge. This was an action brought by the plaintiff against the defendant on a life insurance policy, dated 25th October, 1869, by which the defendant contracted to insure the plaintiff and her husband, on the terms and stipulations therein contained, in the sum of \$1,000.00, during the continuance of their natural lives. The plaintiff alleges that her husband, T. M. Sullivan, died on the 7th day of May, 1870. The defendant pleaded in bar of the plaintiff's right to recover the non-payment of the premium due on the policy on the 25th of April, prior to his death, as required by the terms and conditions of the policy, which is as follows: "That an annual premium of \$58.04, [is] to be paid on the 25th day of October in each and every year from the date of and during the continuance of this policy, which annual premium is to be paid in manner following: An annual loan of \$29.00, and a cash semi-annual premium of \$14.81, to be paid on the 25th day of October and April. Provided, always, and this policy is issued by this company, and accepted by the insured, on the following express conditions: 1st, If the premiums due on this policy shall not be paid at the times abovementioned, then this policy shall terminate, and become void and of no effect." Such is the express condition of the contract in relation to the non-payment of the premiums stipulated to be paid in the policy. On the trial of the case, it was not pretended that the semi-annual premium which became due on the 25th of April, 1870, had been paid, or offered to be paid, by the insured to the company, or its agents; but the plaintiff offered evidence to prove that, prior to the execution and delivery of the policy, one Laird, who was acting as the agent of the company to obtain policies of insurance, told the deceased that it would make no difference if the premiums were not paid regularly to the day, so the money was paid in a short time after the day, if paid as soon as convenient afterwards. On objection being made, this evidence

Dillard v. The Manhattan Life Insurance Company.

was rejected by the court, and the plaintiff excepted. There was no error in the court in ruling out this evidence. It is a well settled principle of law that *parol* declarations cannot be received to vary or contradict the terms of a written contract. All that was said between the contracting parties in relation to the terms and stipulations of the contract is presumed to have been merged in the written contract, which is the highest and best evidence of the contract between the parties, in the absence of any evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties. And the same may be said of the entire evidence of Mrs. Sullivan, which was ruled out by the court. As to the evidence of the custom of the company to receive the payment of premiums after the day of payment had expired, from living persons who were insured, admitting that such a custom was proved, still, there was no evidence that it was the custom of the company to receive the payment of premiums after the day of payment, when the company had notice that the insured was dead, if the same had been tendered, which was not done in this case. After a careful examination of the facts of this case, and the law applicable thereto, we are of the opinion there was no error in the court below in granting the nonsuit. It was said on the argument, that this is a hard case on the widow and children of the insured, and we feel it to be so; but as the company insists upon its strict legal rights under the contract, it is our duty to administer the law applicable thereto.

Let the judgment of the court below be

Affirmed.

MARY H. DILLARD, plaintiff in error, *vs.* THE MANHATTAN LIFE INSURANCE CO., defendant in error.

(44 Ga. 119. Supreme Court, 1871).

War. Failure to pay premium. — A insured the life of her husband in 1859, and paid the premiums duly until 1862. From this time until in 1865 the premiums, owing to the existence of the late war, were not paid, at which time the husband had died. Afterwards the war having terminated, the unpaid premiums were tendered and refused. *Held*, that the tender was ineffectual.

ACTION upon a policy of insurance on the life of the husband of the plaintiff. The insurance was effected in April, 1859, and the premiums were duly paid until April, 1862. The plaintiff

Dillard v. The Manhattan Life Insurance Company.

and her husband were at this time residents of Georgia ; and the rebellion was then raging, whereby the plaintiff was prevented from paying the premiums. In February, 1865, the husband died, and soon after the war closed the plaintiff tendered the unpaid premiums, and demanded the sum insured, which was refused.

H. L. Benning & James M. Russell, for the plaintiff in error.

Smith & Alexander, for the defendant.

The cause was dismissed on demurrer.

MCCAY, J. We recognize fully the general doctrine contended for by the plaintiff in error. It would have been, *illegal* for Mrs. Dillard to pay the premium to the company during the war, contrary to act of Congress. And were this a case of a *forfeiture* for the failure, we should hold that the forfeiture was prevented by the illegality of the performance of the condition. But is this such a case ? The company contracts to pay so much at the death of the insured, if the annual premiums are paid as stipulated. It is clear from the policy, and from the known practice of all companies, that the insured has a right at any time to refuse to pay and give up his policy. The contract upon its face requires to be renewed from year to year by the payment of the premium. Indeed, a contract of life insurance is at best nothing but an undertaking that the company will take the annual premiums paid, invest them safely, and pay to the insured the product, after deducting the expenses of the business. Indeed, if every person insured lived to an average age, this would be exactly the contract. But as any individual may die at any time, the company agrees to pay him what his premiums would amount to, making up its losses on him by the payments of those who live beyond the average age. The regular annual payment of the premium agreed upon is thus a condition precedent of the contract, and not a condition subsequent. And it is just here that the authorities relied upon fail to apply. If a condition subsequent become illegal, there is no forfeiture ; for the estate having once vested, it shall not be divested because the party fails to do an illegal or impossible act. Code, section 2680. But it is different with a condition precedent. If that be illegal the right never vests. It is not a question of forfeiture, but a failure to do the thing necessary to acquire the right. Broome's Legal Maxims, p. 176. And this, as it seems to me, is a distinction based upon principles of justice and sound sense. If I promise a man to sell

Dillard v. The Manhattan Life Insurance Company.

him my house, provided he appear on a particular day with the money, and he fails for whatever reason other than my fault, he has no right in the house. But if I sell him the house, and it is agreed that he shall forfeit it if he fail to pay me for it in full by a particular day, then the *cause* of his failure may, both in equity and sound sense, become very material.

We are very clear that, as the case is made by the record, the judgment is right.

Judgment affirmed.

NOTE.—The doctrine of this case is not accepted law. It is supported by *O'Reilly v. Mutual Life Ins. Co.* 2 Abb. Pr. N. S. 167; *S. C.*, ante, vol. 2, p. 97. But it is opposed by *New York Life Ins. Co. v. Clopton*, 8 Bush, 179; *S. C.*, ante, vol. 2, p. 709; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 614; *S. C.*, ante, vol. 2, p. 168; *Robinson v. International Life Assur. Co.* 42 N. Y. 54; *S. C.*, ante, vol. 2, p. 748; *Statham v. New York Life Ins. Co.*, post, p. 645; *Hamilton v. Mutual Life Ins. Co.*, post, p. 788; *Cohen v. New York Mut. Life Ins. Co.*, post, p. 715; *Hillyard v. Mutual Benefit Life Ins. Co.*, post, p. 661; *Semmes v. Hartford Fire Ins. Co.* 13 Wall. 158. The last named case was decided upon the effect of war on the limitation clause, which was clearly a condition subsequent. But it may be doubted if the doctrine that the payment of premiums is a condition precedent be not limited to the first premium. But see *Sands v. New York Life Ins. Co.*, post, p. 726.

It may be worthy of notice, however, that in the principal case the insured died during the war, and that the back premiums were not tendered until after the death. In the other cases, with the exception of *Hillyard v. Mutual Benefit Life Ins. Co.*, supra, (see note to that case,) the tender was made during the life of the insured.

INDIANA.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY *vs.*

MILLER, administrator.

(39 Ind. 475. Supreme Court, 1872.)

Application. Warranty.—A life policy provided that if the declaration made by the assured, of even date with the policy, and upon which the contract was based, should be found in any respect untrue, the policy should be void. *Held*, that the application and policy must be regarded as one instrument, and the declarations in the former are therefore warranties.

THE case is stated in the opinion of the court.

DOWNEY, J. This was an action by the appellee, as administratrix of Herman A. Miller, deceased, against the appellant, on a policy of insurance upon the life of the deceased. It was provided in the policy that if the declaration made by or for the assured, of even date with the policy, and upon the faith of which the agreement was made, should be found in any respect untrue, then in such case the policy should be null and void. It was stipulated in the declaration, made and signed by the deceased at the time of his application for insurance, that the answers of himself, his physician, and his friend should be the basis of the contract. In the particulars given of himself the following questions and answers occurred:—

“ 10. Has the party had, since childhood, disease of the heart, rupture, fits, dropsy, liver complaint, bilious colic, rheumatism, gout, habitual cough, bronchitis, asthma, spitting of blood, consumption, paralysis, apoplexy, insanity, fistula, ulcers, or disease of the kidneys or bladder, and which? No.

“ 11. Has the party had any sickness within the last ten years? if so, what? Yes, scarlet fever, eight years ago.

“ 12. Has the party now any disease or disorder? if so, what? No.”

The first paragraph of the answer alleges that the answer to the tenth question was false, in this, that before the time at which said answer was made, the said Herman A. Miller had had

spitting of blood, and had had, and then had, consumption ; and that the answer to question eleven was false, in this, that prior to the time at which said answer was made, said Miller had had sickness other than scarlet fever eight years before, to wit, bleeding of the lungs ; and that the answer of said Miller to the question numbered twelve was false and untrue, in this, that at the time when said answer was made the said Miller had consumption of the lungs.

The second paragraph of the answer alleges that the execution and delivery of the said policy of insurance was obtained by the fraud and misrepresentation of said Miller, in this, that he pretended and represented to the defendant, at the time when he applied to the defendant to make and deliver to him the said policy of insurance, that he never had since childhood had spitting of blood, whereas, in truth and in fact, he had had spitting of blood within one year prior to said application ; and that he had had no sickness within the past ten years other than scarlet fever, whereas, in truth and in fact, he had had, within the past one year, bronchitis and bleeding of the lungs ; and that he then had no disease, whereas, in truth, he then had the disease known as consumption ; and that he had not had any medical attendant for the past seven years, when he had been attended by at least two physicians within the past seven years. All of which representations the said Miller well knew to be false.

Issue was formed by a general denial of the paragraphs of the answer. There was a trial by a jury, and general verdict for the plaintiff, and also certain special findings.

The defendant moved the court for a new trial, because, —

1. The verdict was contrary to law.
2. It was contrary to the evidence.
3. It was not sustained by sufficient evidence.
4. Because error of law occurred at the trial of the cause, which was excepted to at the time by the defendant, in this, that the court in giving instructions to the jury gave instructions contrary to law.
5. Because of error of law occurring at the trial of the said cause, which was excepted to at the time by defendant, in this, that the court refused to give to the jury instructions asked for by the defendant, which said instructions were according to law.
6. Because the defendant and her counsel were surprised at the

withdrawal, by the counsel for the plaintiff, of his demand for written instructions, after he had notified the court and defendant's counsel that he had made such a demand ; such withdrawal having been made without notice to the defendant or her counsel, and a knowledge of which did not come to defendant or her counsel until too late to make such a demand on their own behalf.

7. Misconduct of the counsel for plaintiff, in withdrawing his demand for written instructions, after public notice of such demand, without notifying the defendant or her counsel of such withdrawal.

This motion was overruled by the court, and final judgment rendered on the verdict of the jury for the plaintiff.

The errors assigned are : —

1. That the court erred in giving to the jury the instructions set out in the record.

2. The court erred in refusing, at the request of the defendant, to give the instructions asked for by appellant, and which are set out in the record, and numbered 1, 2, 3, 4, 5, 6, 7, and 8.

3. The court erred in overruling the motion of appellant to set aside the verdict of the jury and grant her a new trial herein.

4. The court erred in rendering the judgment against appellant, which is set out in the record.

For these errors occurring during the trial, we must look to the reasons assigned in the motion for a new trial, and not to the assignment of errors, except so far as it alleges the improper overruling of that motion. The first and second assignments of error must, therefore, be disregarded by us. The fourth alleged error has nothing on which to rest. If the motion for a new trial was properly overruled, the judgment followed as of course. We shall then proceed to examine the reasons which were assigned for a new trial.

Nothing is urged under the first reason for a new trial, that is, that the verdict was contrary to law.

The second and third reasons are, that the evidence was not sufficient to justify the finding of the jury.

The policy was made on the 3d day of September, 1869. It became material to know, among other things, whether the deceased, before that time, had had, or then had, spitting of blood or hemorrhage from the lungs, or not, or whether he then had

consumption or not, and whether he had any disease. John Rasch testified that the deceased was employed in his store on the 1st day of July, 1869, and remained there for sixteen or seventeen days, when he left on account of bad health; that during that time he had bleeding of the lungs several times very badly; that he often spit up more than a tumbler full of blood; that at one time while he was there they thought he was going to die, and he went after Dr. Ehrman and brought him to the store to see Miller; that Miller told him, after he left his employment, that he was going to get his life insured, in order to get the money on the policy; that he had been to see Dr. Sheller, and that the doctor had told him that the bleeding came from his lungs.

Dr. H. M. Harvey testified that the deceased came to his office in the early part of July, 1869, to consult him; that the deceased told him that he had had hemorrhage; that he examined him and found that he had tubercles upon one of his lungs, — he did not remember which; he told the deceased that he had incipient consumption, and that he must change his employment and live more in the open air; that the deceased came to see him a second time during the same month, and told him he had had another hemorrhage; that he told the deceased that hemorrhage was rather a favorable symptom than otherwise, because the bleeding carried away with it the foreign matter that was in his lungs; thinks he told him that there was nothing serious the matter with him, though he told him at the time that he had incipient consumption; he knew this to be so from a careful examination of his lungs, and from what the deceased told him of his hemorrhages.

John Meyer testified that when the deceased came to Rasch's store he was not sick, that he knew of, but after he had been there a little while he commenced spitting blood; saw him spitting blood at the store four or five times; saw him spitting blood shortly after he was insured; the deceased stayed at Rasch's store after he was insured; sometimes worked at the books, and sometimes sold shoes.

Dr. Ehrman testified that Rasch came for him to go to see Miller; he went, and found Miller suffering from hemorrhage of the lungs, and saw him spitting blood; it came from the lungs and in considerable quantities; does not remember the time; it was at Rasch's store; thinks it was the last spring.

Dr. Sheller testified that he was the attending physician of Miller from August 6th, 1869, to the 18th of November following; the first time he was called to see him was at the house of Christian Georges, on the 6th of August, 1869; he had a hemorrhage of the lungs; saw him spit up the blood, and knew it came from the lungs; he made a close examination of him at that time; he then had consumption, and he attended him for it up to the 18th of November, 1869; when he first saw him he told him he was in a very dangerous condition.

The defendant also gave in evidence the declaration and the particulars of himself, signed by the deceased, containing the questions 10, 11, and 12, and the answers thereto, referred to in the pleadings, and also a statement by the deceased, that he had not had any medical attendance for the last seven years previous thereto. The deceased died April 2d, 1870, of disease of the lungs.

There was other evidence for the defendant, and also evidence for the plaintiff, but it is not necessary to set it out, as it did not materially contradict that which we have stated.

We think, from the evidence, that the jury should have found that, prior to the issuing of the policy, the deceased had had spitting of blood, and that he then had consumption; that he knew he had had spitting of blood, and had sufficient reason to believe that he then had consumption.

The singular charge given by the court, to which an exception was taken, was as follows:—

“The jury must treat this case just as if it was between two individuals, the corporation being entitled to precisely the same rights as though it were a natural person. In the consideration of the questions put to Miller by the company, the jury are to interpret the language used by the usual and ordinary meaning attached to the words. These questions and answers are contained in an instrument which I hold in my hand. Now, in his declaration the party says he is twenty-two years of age. Will anybody pretend that if he had made a mistake of one day it would make the policy void? They ask him if he had ever resided abroad, and, if so, whether he was affected with any of the diseases peculiar to the climate. No ordinary man would know what diseases were peculiar to any given climate. In question number ten they ask him if he ever had since childhood

a long list of complaints with hard names. In the first place how are you going to tell when childhood ended? One of the diseases mentioned is rheumatism. Nobody knows, except a physician or surgeon, what that is, and no two doctors agree about it. They tell me I have rheumatism when I know I have not. There is not one man in a thousand in this country that ever saw a case of gout. As to bronchitis, there is not one of you that knew what that disease is until I made the doctors explain it; perhaps some of you know what asthma is. Consumption is a term that we all understand to mean a disease of the lungs. Here is mentioned a disease called fistula. Most people would take that to mean such a disease as horses have, which almost always affects them about the shoulders, but I suppose they mean here what is called *fistula in ano*. Question eleven is, Has the party had any sickness within the past ten years? There is no man that has not been sick sometime in his life. I am sick now. The party can only be required to answer as to sickness that was of such a character as to increase the risk upon his life beyond what it would be upon the life of a man in ordinary good health. If he had had a slight sickness at some time during the last ten years, a negative answer would not be so untrue and fraudulent as to avoid the policy. Question seventeen, in which Miller is asked for the name of his usual medical attendant, must be taken to mean a physician who has attended him in frequent sickness, and cannot be taken to mean one who has attended him only once or twice; and if he had two or three physicians to prescribe for him in occasional sickness, he cannot be said to have a usual medical attendant.

“The certificate of Miller that he had had no medical attendance within the past seven years must be construed in the same way. It cannot be held to mean that he had not had such attendance as Harvey or Ehrman, one of whom saw him twice, and the other only once. If Dr. Sheller attended him from the 6th day of August, 1869, constantly to the 3d day of September, 1869, frequently, not every day, but often, it would make the certificate a fraud upon the company. In order to find that Miller was guilty of fraud upon the company in answering that he had no disease or disorder on the 3d day of September, 1869, they must find that he had such a disease or disorder as would materially increase the risk upon his life, and that he knew, or

had good reason for believing that this was the case. A man may have incipient tubercular consumption, and not be aware of it, especially if the examining surgeon of the company has examined him, and pronounced him sound. If the jury believe that on the 3d day of September, 1869, Miller had consumption, and knew he had it, or had reason to suspect that he had it, they will have to find for the defendant. Spitting of blood is not necessarily a disease which would materially affect the risk. It may occur from a cold, or a blow upon the face or chest, or from inflammation of the fauces or posterior cavity of the mouth, or inflamed gums, and perhaps sundry other causes, none of which would be deemed material by the insurance company.

“In order to find that Miller was guilty of fraud, the jury must find that he knew or was advised, or had good reason to suspect, that he was in such a physical condition as to render the risk greater than in ordinary cases of men in apparent good health. The examining physician, Dr. Walker, must be deemed an agent of the company, and that he is skilled in his profession, and, in the absence of proof to the contrary, that he discharged his duty to the company, and was likely to detect consumption or slight symptoms of it, if it had so far progressed as to make the applicant conscious of the fact that he was diseased.”

The charges asked by the defendant, and refused, are as follows:—

“First. If the jury believe from the evidence that the defendant, before the execution and delivery of the policy sued on, propounded the several questions contained in the application of Herman A. Miller, a copy of which is set out in the answer, to the said Herman A. Miller, and that there is any untrue or fraudulent allegation contained in the same, made to them by the said Miller, as set up in the answer, they must find for the defendant.

“Second. The declaration and answers by the said Herman A. Miller are to be taken as warranties that the statements and answers to questions are true, and any misstatement or untrue answer which is stated in the answer of defendant will render the policy void, and you must find for the defendant; and this will be so whether you find that the misstatement or untrue answers were made fraudulently or otherwise.

“Third. The contract between the insurance company and

the insured is like a contract between two individuals. If one makes false statements with reference to facts material to the settlement of the terms upon which the contract shall be made, which are exclusively within his own knowledge, and thereby induces the other to agree to terms which he might not otherwise have assented to, the party deceived cannot be held liable upon the contract.

“Fourth. If the jury believe from the testimony that in July, 1869, Herman A. Miller had spitting of blood, they must find for the defendant.

“Fifth. If the jury believe that Herman A. Miller falsely represented to the defendant, that he had had no medical attendance for the seven years next preceding the 3d day of September, 1869, they must find for the defendant.

“Sixth. It is not necessary for the defendant, in order to entitle her to a verdict in her favor, to show that Herman A. Miller knew, at the time of making his answers, that they were untrue, if in fact they were untrue.

“Seventh. If the jury find that on the 3d day of September, 1869, Herman A. Miller had consumption, they must find a verdict for the defendant, and it makes no difference whether he knew it or not. He may have been entirely ignorant of the fact, or may have believed that the symptoms he had did not indicate consumption; yet if, in fact, he had consumption at that time, the jury must find for the defendant.

“Eighth. If Herman A. Miller, prior to the 3d day of September, 1869, and since his childhood, had had spitting of blood, no matter from what cause, it was his duty to have stated the fact in answer to question number ten of his application; and if he failed to do so it was a fraud upon the company and renders the policy void, and the jury must find for the defendant, if, in addition to this, they find that the said Miller made the answers to the questions as averred in the defendant's answer.”

We think that the policy, the declaration, and the particulars of the applicant, must be regarded as one instrument. The policy on its face refers to the declaration, and it refers to the particulars. A covenant or agreement, to become a warranty, need not appear on the face of the policy, but may be on a paper referred to in, and made a part of the policy. *Cox v. The Aetna Insurance Company*, 29 Ind. 586, and authorities cited; Angell

Fire and Life Insurance, sec. 151; Bliss, Life Insurance, sec. 57. If the applicant had had spitting of blood prior to the time when he effected insurance on his life, we think he was bound to state the fact in the particulars of himself given by him in answer to the questions propounded to him, and that the fact that he was examined by a surgeon employed for that purpose by the company was no excuse for not having done so. Such questions are designed to induce a full and fair statement of the condition of the party seeking insurance; and in this case the answers must be held to be warranties on the part of the applicant that the facts were as stated by him. Whether the hemorrhage proceeded from one cause or another, it was material and necessary that the statement in answer to the question relating to it should have been true.

Geach v. Ingall, 14 M. & W. 95,¹ was an action upon a policy of life insurance, and was very similar in its facts to the case under consideration. The defendant pleaded several special pleas, among them one in which he alleged that the declaration and statement of the assured was untrue, in this, that at the time of making the same, the said assured had had spitting of blood. Lord Denman, before whom the case was tried, instructed the jury that it was for them to say whether, at the time of making the statement, the assured had had such spitting of blood as would have a tendency to shorten life. Upon appeal and hearing before Pollock, C. B., and Barons Alderson and Rolfe, a new trial was ordered for the misdirection of the judge. Pollock, C. B., said: "By the expression, 'spitting of blood,' is, no doubt, meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body; still, however, one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought, therefore, to be stated." Rolfe, B., said: "I have no doubt that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The facts should be made known to the office, in order that their medical adviser might make inquiry into its cause."

In *Vose v. The Eagle Life, &c. Ins. Co.* 6 Cush. 42,² one of the questions propounded to the insured, when he applied for

¹ *Ante*, vol. 2, p. 306.

² *Ante* vol. 1, p. 161.

insurance was, "Has the party or any of his family been afflicted with pulmonary complaints, consumption or spitting of blood?" To which he answered in the negative; and it is said: "The usual mode of proceeding, to effect an insurance upon a life, is, for the party wishing to insure to procure at the office of the insurers a printed form of proposal, which is to be filled up by him. This form, in general, contains a large number of interrogatories, the answers to which are to be written upon the blanks left for the purpose. This was the course of proceeding in the present case, and several of the interrogatories and answers thereto are given in the statement. This proposal or declaration, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends. The party effecting an insurance cannot be too cautious, therefore, in ascertaining the real state of the facts alleged in his declaration."

In that case, because the party had answered the above interrogatories untruly, judgment was given for the company.

A warranty may be of the existence or non-existence of some fact, when it is in the nature of a precedent condition; or it may be promissory, as when the insured undertakes to perform or abstain from some act in the future, when it is in the nature of a condition subsequent.

A representation differs from a warranty; for while the latter must be true, the former need only be substantially true — true so far as the representation was material to the risk. A fact is to be deemed material, if a knowledge of it would have induced the insurer to have refused the risk or to have charged a higher rate of premium for taking it.

The charge given by the court in this case need not be particularly examined. The court seems to have lost sight entirely of the distinction between a warranty and a mere representation. Had the case been tried on the issue formed by the second paragraph of the answer alone, the doctrine with reference to the effect of misrepresentations might have been applicable. But the charge given to the jury by the court was wholly inapplicable to the issue formed by the first paragraph of the answer setting up the warranties.

Whether the case is to be regarded as one depending on the

The Franklin Life Insurance Company v. Hazzard.

warranties, or on the misrepresentations alleged in the second paragraph of the answer, we are clear that it was wrongly decided.

The instructions asked by the defendant, and refused by the court, being in accordance with the law as above stated, should have been given by the court, and the charge given should have been withheld ; or so far as it was law, and applied to the question of representations, it should have been confined to the issue formed by the denial of the second paragraph of the answer.

The remaining question is new. The law requires the judge, when requested by either party, to put his instructions to the jury in writing. Here the counsel for the plaintiff openly requested the court to put the charge in writing, and afterward, when it was too late, as is contended, for the defendant to make such a request, the demand of the plaintiff for written instructions was withdrawn. It is insisted that this is cause for reversal of the judgment. We do not think so. It does not appear that any oral instructions were given by the court, or that the defendant was in any way injured by the course pursued. The court might, without doubt, have taken the necessary time, if the request had been made, to prepare instructions in writing, but no such request was made.

The defendant had the same right to ask for, and insist upon, written instructions that the plaintiff had, and if it wished to make sure of such charges, should have preferred its own request, and not depended on its adversary.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Note. — *Quære* if the answers were warranties. See *Campbell v. New England Life Ins. Co.* 98 Mass. 381 ; *S. C.*, ante, vol. 1, p. 229.

THE FRANKLIN LIFE INSURANCE CO., appellant, vs. WILBUR F. HAZZARD, appellee.

• (2 Ins. Law J. 180. Supreme Court, 1872.)

Assignment. Insurable interest. — The assignee of a life policy must have an insurable interest in the life as well as the insured (the assignor) himself.

THE case is stated in the opinion of the court.

U. J. Hammond & J. M. Judah, for appellant.

Wilson Morrow & Nelson Trusler, for appellee.

The Franklin Life Insurance Company v. Hazzard.

WORDEN J. This was an action by the appellee against the appellant on a life insurance policy issued by the appellant to one William S. Cone, and by Cone assigned to the appellee.

Issue, trial, finding and judgment for the plaintiff below, a motion for a new trial having been made by the defendant and overruled, and exception having been duly taken.

The policy was issued September 2d, 1867, and stipulated for the payment of the sum of \$3,000.00 by the company to the assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest, and of the death of said Cone, deducting therefrom all indebtedness of the party to the company.

The premium paid down was \$62.40, and a like premium was to be paid by the assured annually on the 2d of September during the life of Cone. By the terms of the policy, if the first premium to become due after the issuing thereof should not be paid at the time specified, the policy was to be forfeited, and the policy was not to be assigned without the consent of the company.

The material facts on which we place the decision of the cause are these: On the 2d of September, 1868, the premium then falling due was not paid. Cone afterwards said to the agent of the company that he had concluded not to keep up the policy, and he declined to pay the premium.

Finally, he sold the policy to the appellee, Hazzard, and on the 17th of September, 1868, duly assigned the same to him, and the assignment was assented to by the secretary of the company, subject to the conditions of the policy. Hazzard was not the creditor of Cone, nor had he otherwise any insurable interest in his life, but he simply purchased the policy, and paid therefor the sum of twenty dollars. On the policy being assigned to Hazzard, he arranged with the company for the premium due on the 2d of September, 1868, by paying a part thereof in money, and giving a note for the residue, which, we infer, was afterwards paid. Cone died in July, 1869.

Can the appellee on these facts maintain the action?

We place no stress on the fact that the premium was not paid at the time it fell due, because the forfeiture of the policy seems to have been waived by the subsequent receipt, by the agents of the company of the premium.

But the question arises whether a person can purchase and

hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest. This question is one of first impression in Indiana, and the authorities elsewhere are somewhat in conflict upon the point. We therefore feel at liberty to decide it in conformity with what seem to us to be the general principles of law applicable to the question. There can be no doubt that a policy issued to Hazzard upon the life of Cone, the former having, as in this case, no insurable interest in the life of the latter, would be absolutely void. We quote the following passage from the opinion of the court as delivered by Judge Selden in the case of *Ruse v. Mutual Life Ins. Co.* 23 N. Y. 516 :¹ "Our inquiry therefore is, whether at common law, independent of any statute, it is essential to the validity of a policy obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life of the insured. A policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. Wagers in general, that is, innocent wagers, are at common law valid ; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes then does a wagering policy of insurance belong ? Aside from authority, the question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against."

There are many authorities establishing that such policies are void as contravening public policy, but it is unnecessary to make further reference to them.

Now if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another ? If he purchase a policy, as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same "demoralizing system of gaming," and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriter.

¹ *Ante*, vol. 1, p. 472.

We are aware that the doctrine is held in New York, that if the policy is valid in its inception, it may be assigned to any one, whether he have any interest in the life of the assured or not. *St. John v. The American Mutual Life Insurance Company*, 13 N. Y. 31; ¹ *Valton v. National Loan Fund Life Assurance Company*, 20 N. Y. 32.² Such also seems to have been the view taken by the vice-chancellor in the case of *Ashley v. Ashley*, 3 Simons, 149.

But the contrary doctrine is maintained in Massachusetts. *Stevens v. Warren*, 101 Mass. 564.³ The following passages from the opinion of the court in the latter case will show the scope and effect of the decision:—

“The plaintiff, as administrator of Barton, holds the proceeds of a policy of insurance upon the life of his intestate.

“The fund is assets in his hands for the benefit of one of the defendants as next of kin, after payment of debts, unless the other defendant is entitled to receive it by virtue of an assignment of the policy in the lifetime of the assured. . . . The only question to be determined in regard to the rights of the parties is, whether an assignment of the policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right, in law or in equity, to the proceeds when due. The court are all of opinion that it did not.

“In the first place, it is contrary to the express terms of the policy itself, by which it is provided and declared that any such assignment shall be void. In the second place, it is contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. The general rule recognized by the courts has been that no one can have an insurance upon the life of another unless he has an interest in the continuance of that life. Dewey K. Warren, ‘the assignee of the policy,’ had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security, and to assert an absolute right by purchase. The rule of law against gambling policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and

¹ *Ante*, vol. 1, p. 372.

² *Ante*, vol. 1, p. 436.

³ *Ante*, vol. 1, p. 297.

enforced against the representatives of the assured. When the contract between the assured and the insurer is expressed to be 'for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts. c. 58, § 62. . . . The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

The decision in the above case is made to rest quite as much upon the second as the first ground stated, namely, that an assignment of a policy of life assurance to one having no interest in the life of the assured, when the assignment is a cover for a speculating risk, is void, as contrary to the general policy of the law respecting insurance.

After pretty mature consideration, we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine on the subject.

All the objections that exist against the issuing of a policy to one upon the life of another, in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such policy is interested in the death, rather than the life, of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. In either case he is subject, in the language of Judge Selden above quoted, to "strong temptations to bring about the event insured against."

In this case there was but a simple purchase of the policy by Hazzard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life.

The Franklin Life Insurance Company v. Hazzard.

His contract of purchase was essentially a wager upon the life of Cone, and his interest lay in the payment of few or no intermediate annual premiums, and the early happening of the event which was to entitle him to the \$3,000.00. By his purchase he became interested in the early death of the assured. We are of opinion that the law will not uphold such purchases, and that the appellee acquired no right to the policy or to the sum secured thereby.

Life assurance policies are assignable, to be sure; but in our opinion, they are not assignable to one who buys them merely as matter of speculation, without interest in the life of the assured. What is such an interest in the life of another as will authorize one to insure his life or purchase a policy upon his life, is a question not involved in the case, and we express no opinion upon it.

It has been suggested by the counsel for the appellee that our statute providing for the assignment of contracts embraces contracts of this description as well as others. This may be, but we do not think the statute contemplates the valid assignment of a contract to a party, who, under the circumstances, in view of the general principles of law, is incapable of being an assignee of the contract. In our opinion the plaintiff below was not, on the facts shown, entitled to recover, and the motion for a new trial should have prevailed.

The judgment below is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Note. — The doctrine of this case will not be readily accepted as law. It is clear that a party may insure his own life for the benefit of any one whomsoever, regardless of interest. *Campbell v. New England Mut. Life Ins. Co.* 98 Mass. 381; *S. C.*, ante, vol. 2, p. 229. And if this be true, it is difficult to see why the insured cannot assign his policy to a person having no interest in his life. The only difference is that the person designated to receive the money is in the one case named on the face of the policy, and in the other not. The case is hardly reconcilable either with the doctrine that the cessation of what was, at the granting of the policy, an insurable interest does not affect the liability of the company. See *Dalby v. India and London Life Assur. Co.* 15 Com. B. 365; *S. C.*, ante, vol. 2, p. 371; *Mowry v. Home Ins. Co.* 9 R. I. 346; *S. C.*, ante, vol. 1, p. 698.

To enable the assignee, however, to sue in his own name, it would be necessary for him in all cases to obtain the consent of the company to the assignment; it would not be sufficient at common law for the assignor alone to obtain a promise by the company to pay the assignee; the promise should also be to the latter. See *Exchange Bank v. Rice*, 107 Mass. 37; *Jessel v. Williamsburg Ins. Co.* 3 Hill, 88; *Conover v. Mutual Ins. Co.* 1 Comst. 290.

IOWA.

WILKINSON *vs.* THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(30 Iowa, 119. Supreme Court, 1870.)

Warranty. Construction of. — While a stipulation in a policy of life insurance, that if the answers to the questions contained in the application “shall be found in any respect untrue,” the policy shall be void, constitutes such answers a warranty of their correctness in every particular, yet the language of such questions is, nevertheless, to have a reasonable construction in view of the purposes for which they were asked. It is accordingly *held*, that a negative answer to the question as to whether the party “ever met with any accidental or serious injury,” will not, though untrue, avoid the policy, if it be shown that the injury was slight, and in no way affected the future health of the applicant.

ACTION upon a policy insuring the life of Malinda Jane Wilkinson, the wife of plaintiff. Both the plaintiff and his wife were formerly slaves; their freedom was among the fruits of the rebellion. They came to Keokuk in 1862; were married in 1864; they obtained two policies on her life for his benefit, and three on his for her benefit, the one in controversy being obtained in September, 1866, for thirty-one hundred dollars; she died in 1869. The defendant admitted the policy, death, proof, &c., and pleaded falsity of certain answers in the application, and fraud in obtaining the policy. Jury trial. Judgment for plaintiff, and defendant appeals.

Gilmore & Anderson, for the appellant.

McCrary, Miller & McCrary, W. J. Cochran & J. H. Craig, for the appellee.

COLE, C. J. 1. The policy was issued “upon the faith of the statements in the application,” with a stipulation that if they “shall be found in any respect untrue,” the policy shall be void. The main contest was upon the truth or falsity of the answers to the following questions contained in the application signed by the plaintiff and his wife, upon which the policy was issued: 9. Has father, mother, brother, or sister of the party died or been afflicted with consumption or any other disease of the lungs, or insanity? If so, state full particulars of each case. No. How many brothers and sisters in all? One brother. How many have died, and of what disease? One sister died in infancy. What is the

present health of the survivors? Good. 10. Has the party been or is she now afflicted with fits, dropsy, liver complaint, asthma, spitting of blood, gout, rheumatism, insanity, rupture or fistula, and which? No. 11. Has the party been afflicted with disease of the heart, of the urinary, and, *if a female, of the uterine organs*; if so, which? No. 12. Has the party been afflicted during the last seven years with any severe or acute constitutional disease, and what? No. 13. Is the party now afflicted with *any* disease or disorder, and what? No. 14. Has the party ever met with any accidental or serious personal injury; and if so, what was it? No. The evidence was conflicting as to whether these answers were true or false.

The defendant asked eleven instructions, in substance applying the same to each answer as above set out, that the answers to the questions constitute *a warranty*, and if they were untrue, whether intentionally so or not, they must find for defendant. These were refused; and the court gave several instructions, substantially, that "it was the duty of plaintiff and wife to answer each and every question truthfully, and if they did not do so *on every material matter or question*, then plaintiff cannot recover;" and again: "The answers to each and every question in the application *must be substantially true, and any misstatement of facts in the application upon any material matter inquired of*, whether intentional or not, would avoid the policy," &c. If the cause had been submitted to the jury for a general verdict upon these instructions, without more, and they had found for plaintiff, it would be our clear duty to reverse. Under the terms of the policy in this case, the answers to the questions contained in the application became warranties, not that they were *substantially true* as to the material matters, but that they were true in every particular, although, in the opinion of the jury, such particular, wherein they were untrue, may not have been material to the risk. See Angell on Fire and Life Insurance, § 140, *et seq.*, and § 307, *et seq.*; *Everett v. Desborough*, 5 Bing. 503;¹ 3 Kent's Com. 288; *Miles et al. v. Conn. Mut. Life Ins. Co.* 3 Gray, 580;² *Stout v. The Fire Ins. Co. of New Haven*, 12 Iowa, 383; and cases cited by appellant's counsel. But the jury were not required by the court or parties to return a general verdict. They were required by the court, at the request of the defendant, to find

¹ *Ante*, vol. 2, p. 226.² *Ante*, vol. 1, p. 173.

specially as to the first five, and by the court, on its own motion, as to the last three specific facts. Their finding was as follows:—

1st. Did Sarah, the mother of Malinda Jane Wilkinson, die with consumption, or was she afflicted with consumption or any other disease of the lungs? Answer. No.

2d. Was Malinda Jane Wilkinson, at the date of the application, (September 14th, 1866,) afflicted with any disease or disorder? Ans. No.

3d. Did Malinda Jane Wilkinson, prior to September 14th, 1866, meet with any accidental personal injury? Ans. Yes.

4th. Did Malinda Jane Wilkinson, prior to September 14th, 1866, meet with *serious* personal injury? Ans. No.

5th. Did Malinda Jane Wilkinson, on or about the year 1862, fall at a considerable height from a tree, and was she sick for a time in consequence? Ans. Yes.

6th. If the jury find that Malinda Jane Wilkinson did at any time meet with an accidental personal injury by falling from a tree or otherwise, as inquired of in questions Nos. 3, 4, and 5, they will then answer further the following questions:—

Was that injury only temporary, and did it pass off soon? Ans. Yes.

7th. Was said injury (if any) to such an extent as to exert or cause any permanent disease or influence upon the subsequent health of the said Malinda Jane Wilkinson? Ans. No.

8th. Was the injury the said Malinda Jane Wilkinson received from the fall from the tree (if she did so fall) simply temporary, and did it pass off entirely in a few days, without in any manner injuring her subsequent health or longevity? Ans. Yes. This was all, and the only verdict returned by the jury.

The defendant moved for judgment in its favor on the answers returned by the jury, claiming it upon the answers 3 and 5, and insisting that the answers 6, 7, and 8 were immaterial, and that the questions requiring them were improperly submitted. This motion was overruled, and judgment was rendered for plaintiff. It will be observed that the jury found specific and independent facts, having no connection or relation whatever to any proposition of law, and hence no prejudice could have resulted to defendant by reason of the refusal to give proper, or the giving of improper, general instructions to the jury, as before referred to. The single question presented is, whether the answers to the last

three questions so neutralize and override the answers 3 and 5 as to entitle the plaintiff to a judgment? Without such last three answers, it is reasonably clear that the defendant would be entitled to judgment upon answers 3 and 5. In other words, the real question is upon the construction of question 14 in the application, to wit: Has the party ever met with any accidental or serious personal injury, and if so, what was it?

The defendant claims that if the insured "ever met with *any accidental . . . injury*," that will bar a recovery, because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm in infancy; to a cut upon the thumb or finger in youth; to a stumble and falling, or the sprain of a joint, in a more advanced age. The idea is, that such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language, which would make the word "any" an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the courts, the law, the defendant itself, and its business. The language of the question must have a fair construction, and, in the words of our statute, (Rev. § 3994,) "that sense is to prevail against either party in which he had reason to suppose the other understood it."

This construction is not only in accord with reason and justice, but it has the support of the authorities in like cases. Thus, in *Chattuck v. Shawe*, 1 Mood. & Rob. 498,¹ where the insured declared that "he had not been afflicted with nor subject to fits," Lord Abinger, C. B., held this to mean, not that he never accidentally had had a fit, but that he was not a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural or contracted from some cause during life. And the policy was held not to be

¹ *Ante*, p. 10.

vitiated by the circumstance that, in consequence of a fall, the person whose life was insured had, several years before the date of the policy, two epileptic fits within a short interval, which the jury were satisfied had never recurred. So, in the case of *Ross v. Bradshaw*, 1 Wm. Black. 312, the warranty was that the party is in good health. The fact that twelve years before the party had received a wound which produced partial paralysis of the organs of retention of the urine and fæces, but not such an injury as was calculated to shorten life or affect the vital functions, was held not to invalidate the policy; and Lord Mansfield told the jury that all that was necessary was proof that the life was in fact a good one, and so it might be though he had a particular infirmity; and the only question was, whether he was in a *reasonably* good state of health, and such a life as ought to be insured on common terms. See, also, *Watson v. Mainwaring*, 4 Taunt. 763;¹ Angell on Fire and Life Ins. § 310 *et seq.* In this the defendant having admitted the policy, death, and proof of loss, it was not error to render judgment for plaintiff on the special verdict.

II. Several questions were made on the trial as to the admission of testimony which we need only briefly notice. One Hill, a non-professional witness, testified that he had seen persons affected with consumption; he was then asked, "To what extent has been your observation?" This question was objected to, and the objection sustained. While it is probable the objection was premature, yet it is clear that no prejudice resulted to defendant, since the witness could not have given any material testimony as a medical man or expert, it being apparent from his evidence that he was neither. The question put to the witness, Sandusky, as to what disease he always understood Malinda's mother died with, was clearly incompetent and rightly excluded. The deposition of Dr. J. F. Sanford had been taken by the plaintiff. The witness testified that he was a physician and surgeon, and had been engaged in the practice for nearly twenty years. The defendant objected to the sixth and eighth interrogatories and answers in chief, and to the ninth cross-interrogatory and answer. They are as follows:—

Sixth interrogatory. State all you may know in regard to the last illness of said wife of plaintiff; what was her disease and your opportunity of knowing? Answer. My information re-

¹ *Ante*, vol. 2, p. 207.

specting this case was derived from a careful examination which I made of it at the time, and from the history I received of it from the attending physician. Mrs. Wilkinson was laboring, at the time I saw her, under a disease of the lungs.

Eighth interrogatory. What examination, if any, did you make of said wife of plaintiff? and state her condition, the nature of her disease, and the causes of the same, as far as you can tell, and state particularly. Answer. I examined the case by physical explorations and by inquiring into its history. I made up my opinion upon this ground, and from the commemorative [corroborative?] circumstances which I was able to subject to my own observation. My examination of the case was made with special reference (as is usual) to the question of its hereditary or non-hereditary character, and I could not find such evidence of tubercular formations and the incident conditions, as justified the conclusion that this case was one of hereditary consumption of the lungs. The case, as it presented itself to my mind, was one of pneumonia or pleuro-pneumonia, and seemed to have its rise, progress, and decline within a few weeks prior to the date of my visit. I saw nothing in the case of Mrs. Wilkinson, as far as her lungs were concerned, incompatible with her good health a few weeks before that time. Diseases of this character are usually caused by exposure to atmospheric vicissitudes, or from getting wet, inadequate clothing, &c.

Ninth cross-interrogatory. Were you informed by Mrs. Wilkinson, or did you know, that she had been in very feeble health for some years prior to her death? Answer. The previous condition of a patient's health is always an important question in the examination and treatment of a special case of disease, and it was considered and inquired into in this case; but I was not informed that her health had been particularly bad or poor prior to the attack of disease from which she was then suffering.

A careful examination of these answers will show them entirely free from the objections made to them — that they are not responsive and are hearsay, as well as from any other valid objection. They are directly responsive, and there is not a word of hearsay testimony in any one of them. It is true Dr. Sanford says, in his ninth answer, that he derived his information respecting the case from a careful examination, and from the history received from the attending physician. But he does not state

Walsh v. The Aetna Life Insurance Company.

that history, while he does state affirmatively, and as upon his own knowledge, the disease under which the patient was laboring. In the eighth answer, he says he inquired into the history of the disease, but does not give it, or show but that its history was given him by the patient herself; while in the ninth he denies having received the information inquired after. There was certainly no error in overruling the objections to these questions and answers.

As there was no error to the prejudice of the defendant and appellant, the judgment must be *Affirmed.*

See *Insurance Co. v. Wilkinson*, post, p. 810.

WALSH vs. THE AETNA LIFE INSURANCE COMPANY.

(30 Iowa, 133. Supreme Court, 1870.)

Post-dating a permit, to avoid a forfeiture, is valid.

Waiver of forfeiture may be effected by conduct of the company or its authorized agent, inducing the policy holder to believe that the forfeiture will not be insisted upon; as by the subsequent receipt of premium, with knowledge of the breach of condition.

Mutual companies. Notice.—The fact that a person is a member of a mutual insurance company does not fix upon him notice of all the regulations of the company in transacting business.

Agency. Permits.—The power of a special agent to grant travelling permits, and to receive and receipt for money paid thereon, considered. A company held estopped by the conduct of their agent to deny the effect of a permit given by him without authority.

ACTION upon a policy of insurance for \$2,500 upon the life of Edmond Walsh, husband of plaintiff, issued September 10, 1862. The petition alleges that, “on the 23d day of October, 1867, the said Edmond Walsh, having first obtained, in consideration of the additional premium of \$25 to said defendant paid, the previous consent of said defendant to pass south of the 36th degree of north latitude, between the first day of June and November, 1867, died at the city of Vicksburg, Mississippi, which death was not caused by any of the causes excepted in said policy.” It also alleges performance of all conditions of the policy by the plaintiff and deceased, and avers notice and proof of death, demand of payment, and non-payment of the amount of the policy. The petition sets out the policy by copy. The conditions upon which arise the questions presented in this case are in the following words:—

“Provided always, and it is hereby declared to be the true

intent and meaning of this policy, and the same is accepted by the assured upon these expressed conditions, that in case the said Edmond Walsh shall die upon the seas, or shall, without the consent of this company, previously obtained and indorsed upon this policy, pass beyond the settled limits of the United States, (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent thus indorsed, visit those parts of the United States which lie south of the 36th degree of north latitude, between the first of June and the first of November, or shall, without such previous consent thus indorsed, pass to or west of the Rocky Mountains, or shall, without such previous consent thus indorsed, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) or shall, without such previous consent thus indorsed, be personally employed as an engineer or fireman in charge of a steam-engine or locomotive, or as brakeman upon a railroad, or as an officer, hand, or servant of any steam vessel, or in the manufacture or transportation of gunpowder, or in case he shall become so far intemperate as to impair his health seriously and permanently, or induce *delirium tremens*, or shall die by his own hand, or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States, or of the United States, or of any government where he may be, this policy shall be void, null, and of no effect.

“And it also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by the said Edmond Walsh, and bearing date the tenth day of September, 1862, and which are hereby made part and parcel of this policy, as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false and fraudulent, then and in such case this policy shall be null and void; or in case the said assured shall not pay the said annual premium on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.”

Annual renewal receipts from the date of the policy up to and including the year in which Walsh died, are made exhibits. The one for the year 1867 is in the following words: —

Walsh v. The Ætna Life Insurance Company.

“ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

“Assets, Jan. 1, 1867 \$4,401,823.05.

“Received from E. Walsh, fifty-four $\frac{2}{100}$ dollars premium, due September 10, 1867, on policy No. 641, insuring \$2,500 for twelve months, ending on the 10th day of September, 1868, at noon.

“Not binding until countersigned by W. F. Kidder, agent at Davenport, Iowa.

“T. O. Enders, *Secretary*.

“W. F. Kidder, *Agent*.

“Premium, \$54.90.”

By an amendment to the petition it is averred that verbal as well as written consent was obtained from defendant for Walsh to pass south of latitude 36 degrees, between the first days of June and November, and a copy of such written consent, in the following words, was made an exhibit. : —

“DAVENPORT, IOWA, October 2, 1867.

“Received of Mrs. Annie Walsh, wife of Edmond Walsh, insured under policy No. 641, in Ætna Life Insurance Company of Hartford, Connecticut, the sum of \$25, being the extra premium on said policy for residence in the southern restricted territory.

“W. F. Kidder, *Agent, Davenport, Iowa.*”

It is averred that defendant was notified of Walsh's intent to go south of the 36th degree of north latitude prior to November 1, 1867, and of the payment by plaintiff to defendant's agent of the usual premium for such permission, and that defendant made no objection thereto, but consented, and verbally permitted Walsh to go to and remain south of said line, and waived the necessity of reducing said permission to writing and indorsing the same upon the policy. In a subsequent amendment, it is averred that defendant, about the 10th day of October, 1867, having notice that Walsh was then, and long had been, residing within the restricted territory, granted him written permission to reside therein by an instrument in the following words : —

“ÆTNA LIFE INSURANCE COMPANY, HARTFORD, Conn.,

“Nov. 1, 1867.

“Policy No. 641. The insured, E. Walsh, of Davenport, Iowa, is hereby permitted to pass by routes of public travel,

Walsh v. The Ætna Life Insurance Company.

and in the usual modes, and reside in any part of the United States until June 1, 1868, without prejudice to his policy.

“ Ætna Life Insurance Company,
“ T. O. Enders, *Secretary*.”

It is averred that this was issued and forwarded to plaintiff October 10, 1867, upon application made by plaintiff therefor, after defendant was notified of Walsh's residence in the South. The petition further alleges that defendant being notified, October 1, 1867, that Walsh was then and had been residing south of the 36th degree of north latitude, and desired permission to remain there, made no objections thereto, and took no steps to cancel the policy, but, on the contrary, waived all objections to Walsh's residence South, by collecting and receiving from plaintiff the premium on the policy for the following year, and by receiving of plaintiff, with full knowledge of all the facts, an additional premium of \$25, on account of the increased risk incurred by Walsh in residing in the forbidden territory.

The answer denies the allegations of the petition, and especially the authority of Kidder, who executed the receipt, dated October 2, 1870, to bind the company by such an instrument; avers that he was a special agent, and not clothed with power to grant a permit of that character, in avoidance of restrictions in the policy. The receipt by defendant of the \$25 mentioned in the receipt is denied, and it is averred that plaintiff had full notice of Kidder's restricted powers. It is averred that the permit signed by Enders was not intended to confer any right until November 1, 1867, and for that reason was dated on that day.

The answer also avers that the receipt signed by Kidder, dated October 2, 1867, was executed by him after the death of Walsh, and delivered after Kidder had ceased to be agent of defendant, and that the policy was issued on the “ mutual plan,” and as to it defendant is a mutual insurance company. The defendant also avers that plaintiff concealed from the defendant and its agent the fact that Walsh had resided in Vicksburg during the summer previous to his death, and that the payments for the renewal of the policy and the additional premium were made to defendant's agent, while both he and defendant were ignorant of that fact. It is alleged that the permit issued by the agent was fraudulently procured by plaintiff. There was a verdict and judgment for plaintiff. Defendant appeals.

Walsh v. The Aetna Life Insurance Company.

Cook & Drury, for the appellant.

Martin & Murphy, for the appellee.

BECK, J. I. The issues presented in this case involve questions as to the liability of defendant by reason of the payments and receipts set out in the petition. Unless these transactions bind defendant, there can be no recovery. The acts of the agent of defendant, in connection with these payments, are but incidents thereof.

In the consideration of these questions we will find it more convenient, and our labor will be accomplished more speedily, to discuss them in the order suggested by the nature of the case and the issues presented, rather than by following the course pursued in the presentation of the case by counsel.

Our first inquiry relates to the authority of the agent to bind defendant by his acts, as set out in the petition. It is not disputed that the agent was clothed with authority to receive money paid as premiums for the renewal of policies, or as the annual premiums thereon, and sums charged as extra premiums on account of permits to reside in territory falling within the restrictions of the policy. Receipts for annual premiums, signed by the proper officer of defendant, were furnished to him, which he countersigned and delivered upon receiving payments. The form and manner of delivering the receipts, issued on account of premiums for permits, do not so clearly appear. The agent was not empowered to fix or change the rates of annual premiums, nor the premiums for permits; nor was he allowed to grant and issue these permits for residence in forbidden regions. These duties were discharged by other officers of defendant. There can be no doubt, however, that the agent was authorized to receive money upon applications for permits, and issue receipts therefor, which were not in the nature of a contract allowing the privilege sought, but simply acknowledging the payment of the money for the purpose indicated. The power to receive and receipt for the money upon the application, and in advance of the permit, is an incident of his authority to receive applications for that purpose. His authority to receive premiums generally, including extra premiums, covers this power. The receipt of the extra premium by the agent, upon the application for an extension of the privileges of the policy, and the execution of an acknowledgment thereof, were within the limits of his authority. But these acts

of the agent did not, of themselves, create a contract in the nature of a permit. Without more, no such contract could be established.

The receipt of the agent given for the premium paid on account of the permit, if executed and delivered after the suit was commenced, and after he ceased to be the agent of the company, would not, of itself, bind the defendant. But this fact, if it were established, could not prevent the fact of the payment, and the purposes for which it was made being proved by other proper evidence. If the money was paid for the purpose of securing the permit, the fact that the receipt therefor was improperly issued by one having no authority so to do, because of the termination of the agency before its execution, will not render inoperative the payment and preclude proper proof thereof.

II. It will be convenient in this connection to consider the effect of the permit signed by the secretary of the company and dated November 1, 1867. If this instrument was issued upon the application of plaintiff in consequence of the payment of the money to the agent, with the intention of extending the privilege sought thereby, it would clearly operate from the date of its delivery, and not from the date it purports to bear. By the act of post-dating an instrument, intended to secure a present right, its effect and operation, in accordance with the intention of the parties thereto, are not destroyed.

The fourth and fifth instructions given by the court, to which objections are made by defendant, are in harmony with the views we have thus far expressed, and are, therefore, in our opinion, correct expressions of the law.

III. By the terms of the policy, residence of the party whose life was insured, south of the 36th degree of north latitude, is forbidden, and the violation of this condition, it is declared, renders the policy void. A forfeiture by reason of the violation of this restriction may be waived, and acts of the defendant inducing plaintiff to believe that the condition was dispensed with, or the forfeiture waived, will be sufficient to establish a waiver. *Viele v. Germania Ins. Co.* 26 Iowa, 9.

It has been frequently held that the receipt of premiums upon a policy, after the act which otherwise would work a forfeiture, is a waiver thereof. *North Berwick Co. v. New England F. & M. Ins. Co.* 52 Maine, 336; *Viall v. Genesee Mut. Ins. Co.* 19

Barb. 440; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154; *Insurance Co. v. Slockbower*, 26 Pa. St. 199; *Wing v. Harvey*, 27 Eng. Law & Eq. 140.¹

A condition in a life policy prohibiting a party whose life is insured from going south of a certain degree of latitude is deemed waived by the knowledge of the officers of the insurance company that he intended to go south of that line. *Bevin v. Conn. Life Ins. Co.* 23 Conn. 244.² So the knowledge of the officers of an insurance company that the party is sick, and the renewal of a policy upon his life, which had expired by non-payment of premiums, is a dispensation of a condition against ill health. *Buckbee v. U. S. Ins. and Trust Co.* 18 Barb. 541.³ In support of this point, we refer to *Viele v. Germania Ins. Co.*, *supra*, and the authorities therein cited.

Did the agent of defendant possess the authority to do the acts which amount to a waiver or dispensation of the conditions of the policy, restricting the deceased to a residence north of the 36th degree of north latitude, and declaring that the policy shall be void in case of the non-payment of the annual premiums when they become due? There is no difficulty here. It was the duty of the agent to collect the premiums, both annual and for permits to reside in the South. Receipts for the annual premiums were furnished him by the defendant, to be countersigned by him and delivered upon payments being made. These receipts, when delivered, were binding upon the company. He was thus intrusted with powers of considerable latitude, and, so far as receiving payments, and thus continuing or renewing policies, they were quite plenary. The defendant, by intrusting him with the instruments, and power to deliver them, impliedly, as to all dealings with him, clothed him with authority to receive payments, and bound the company by his acts in all cases where it would be proper for the defendant, through any of its officers, so to do. If by the receipt of premiums in any case the defendant would thereby waive the conditions of the policy, payment to the agent in such a case would have that effect. The reason is obvious. The waiver results as a consequence of the receipt of the premiums, which operates as an estoppel, precluding denial of the validity of the policy. *Viele v. Germania Ins. Co.*, *supra*. The

¹ *Ante*, vol. 2, p. 365.
VOL. III.

² *Ante*, vol. 1, p. 19.

³ *Ante*, vol. 1, p. 406.

agent being authorized to receive the premiums, the waiver follows his act of accepting payment thereof. This rule is just and reasonable in its practical effects.

It might often be the source of great wrong to permit the agent to receive the money of those dealing with him, yet deny that his act in receiving it binds his principal. The company would be in a position to receive money without incurring any obligation in return. The receipt of annual premiums will not amount to a dispensation of the conditions, or a waiver of forfeiture, on account of a breach thereof, unless the fact of the breach be known to the officers of the insurance company, or its agent. A contrary rule would deprive the company of the power to protect itself from frauds and impositions. The views we have advanced in this connection are substantially expressed in the sixth instruction given by the court to the jury.

IV. The seventh instruction given by the court is to the effect that, if the agent had no authority to grant permits to reside in the South, which was known to the plaintiff, and she did not act in good faith in applying to or dealing with the agent in reference to the permit, in that case plaintiff cannot recover in this action. This instruction, which is the ground of an objection by defendant, may be considered in connection with the eighth given by the court, which is substantially as follows: A member of a mutual insurance company is presumed to know the rules of the company. If plaintiff in dealing with defendant in her efforts to procure the permit acted upon her own knowledge, she would be bound by the rules of the company. But if she did not, in fact, possess knowledge of these rules and applied to the agent of defendant for instructions, in order to procure the permit, and, following his instructions, paid the money demanded for a renewal of the policy and for the permit, and was thus left to rest in the belief that the agent had full power to act in the premises, and that the permit for which she had applied had been granted, the company is bound by the acts of the agent. In our opinion the principle of these instructions cannot be objected to by defendant.

It may be admitted that the members of a mutual insurance company are presumed to have knowledge of the articles of incorporation and by-laws of the company. It is so ruled in *Simeral v. Dubuque Mutual Insurance Co.* 18 Iowa, 319. In

Cole v. Iowa State Mutual Insurance Co. 18 Iowa, 425, and other authorities cited by defendant's counsel, it is said that the holder of a policy issued by a mutual insurance company is bound to know the *rules* of the company. But it is not to be understood by use of the word "rules" that reference is made to the regulations adopted by the officers of the company in regard to the transaction of business, but rather such rules as enter into the constitution of the company, as provisions of its charter or its by-laws. Rules in the nature of instructions to officers or agents, directing the discharge of their duties, &c., cannot be meant, but rather the rules whereby the liability and rights of members of the company are fixed, which are parts of the laws of the institution. 1 Phillips on Ins. 253 (a); *Treadway v. Hamilton Mut. Insurance Co.* 29 Conn. 68; *Baxter v. Chelsea Mutual Fire Insurance Company*, 1 Allen, 294; *Hale v. Mechanics' Mutual Fire Insurance Company*, 6 Gray, 169.

It does not appear that the articles of incorporation or by-laws of defendant restricted the powers of agents or prescribed the duties to be performed by them. Unless it so appears, the rule above stated would not be applicable to this case. In this respect the instructions last noticed, if objectionable, err on the side of defendant.

The other principles of the instructions are in accord with the law. The defendant cannot be permitted to escape liability from the acts or representations of an agent in the course of its business which he is authorized to transact, whereby a party dealing with it is induced to pay money in the belief that he will receive security in return. The agent of defendant, as we have seen, was empowered to receive payments made to defendant in the course of its business. The plaintiff could well rely upon the representations of the agent that the payment to him was the regular course to pursue in order to obtain the permit required. If the acts of defendant and its agent induced the belief on the part of plaintiff that the permit was issued upon the payment of money to the agent, defendant is estopped to deny it.

V. In the third instruction the jury were informed that "it is conceded that Walsh went South at a time when he was authorized to go" by the policy. This is excepted to on the ground that the fact stated is not shown by the record. How the fact was conceded, the instruction does not state. It may have been

orally, in open court, or in argument to the jury, or in other ways that would authorize the court to make the statement. The fact is not inconsistent with the record. The plaintiff, having excepted to the statement of fact made by the court, should be able to contradict it by the record. It does not appear that any attempt was made to call the attention of the court to this statement or correct it, if, as is claimed, it was not supported by the facts. It will be observed that it is not an attempt to state the effect of the evidence, but rather the statement of a fact admitted by the parties. We must consider that the court was warranted in making it by an admission of the fact, of which he had proper knowledge.

VI. A certificate of the state auditor showing the authority of the agent was admitted in evidence against defendant's objection, based on the ground of its immateriality. It was not denied that the party named therein was the agent of defendant. Admitting this evidence to be immaterial, we have failed to discover that it did or could have affected prejudicially defendant's rights. It is, therefore, not an error that requires the reversal of the case.

VII. Certain circulars and books purporting to have been issued by defendant were admitted in evidence, defendant objecting, for the reason that it was not shown that plaintiff had knowledge of them, or was influenced by them in her dealing with defendant. This evidence was claimed, for that reason, to be immaterial. We understand these documents to be in the nature of publications to the world of the rules governing defendant in the transaction of its business, and for that reason would be binding upon it, though not brought to the knowledge of plaintiff. They were therefore admissible in evidence without the preliminary proof which defendant's counsel insists was necessary.

VIII. The agent, Kidder, was permitted to testify that, at the time he received the extra premium, he treated the payment as conferring permission upon Walsh to reside in the South. This evidence was objected to, because it is the expression of an opinion as to the legal effect of the payment made to him, and because he had not the authority to grant the permit in question, nor to determine what would constitute one. The evidence is not the statement of an opinion, but of a fact, and the agent's authority could have no bearing upon it. The issue was pre-

Miller v. The Mutual Benefit Life Insurance Company.

sented whether the defendant is estopped by its acts and the acts of its agent, in treating the conditions of the policy as dispensed with, from setting up a breach of these conditions as a defence to the action. The evidence complained of establishes these acts so far as the agent is concerned. In our opinion it was properly admitted.

IX. An officer of defendant testified that, on account of yellow fever prevailing in the South, they would not, at the time, grant permits for residence there. This evidence was properly excluded. It assigns a reason for a general course of business, and does not state facts which would enable the jury to determine the issues in the case, which were whether the conditions of the policy were waived by a special contract, by a permit, or by the acts of the defendant and its agents in treating them as dispensed with. It does not follow that defendant, because generally permits were refused, did not issue one in this case, or waive the condition of the policy requiring it.

X. It is claimed that the verdict is not supported by the evidence. Upon this point there may exist a doubt. We cannot interfere with the verdict unless it appear that it was not the result of a fair and intelligent exercise of the judgment and conscience of the jury. We cannot so regard it.

We have examined all the points made by counsel with the care demanded by the importance of the case, and the ability exhibited in its argument, and are satisfied that the judgment of the district court should be

Affirmed.

MILLER vs. THE MUTUAL BENEFIT LIFE INSURANCE CO.

(34 Iowa, 222. Supreme Court, 1872.)

Intemperance. Verdict contrary to evidence.—A life policy contained a provision that death "by reason of intemperance from the use of intoxicating liquors" should avoid the contract. It was proved that the insured had been an intemperate man for years, and often given to paroxysms of gross intoxication, and that in one of these paroxysms he was pronounced by a physician to be in *delirium tremens*. An affidavit of the same physician was also produced to the effect that the insured had died of intemperance and exposure; and this physician testified at the trial that he had died of congestion of the lungs and brain caused by intoxicating drink. Verdict against the insurance company, which was set aside as contrary to evidence.

THE case is stated in the opinion.

Miller v. The Mutual Benefit Life Insurance Company.

Adams & Robinson and Griffith & Knight, for the company.

De Witt C. Cram & C. J. Rogers, for the plaintiff.

BECK, C. J. The policy, which is the foundation of this action, contains a condition to the effect that in case the party whose life is therein insured, James A. Miller, shall die "by reason of intemperance from the use of intoxicating liquors," the said instrument shall be void and of no effect. As a defence to the action, defendants pleaded that the said James A. Miller did die by reason of intemperance from the use of intoxicating liquors, and thereby the policy became null and void, and plaintiff is defeated of his action thereon. Other issues were raised by the pleadings, but in the view we take of the case their consideration is rendered unnecessary.

Upon the issue presented by the defence just stated, evidence was introduced by the parties and the cause was submitted to the jury, who were instructed to the effect that, in case they found Miller died from the intemperate use of intoxicating liquors, their verdict should be for defendant. They were also informed by the court that the burden of proof upon this defence rested upon defendant, and that it was not necessary for them to be satisfied beyond a doubt of the fact of Miller's death from intemperance, but a preponderance of proof to that effect would authorize them to find for defendant. In addition to the general verdict for plaintiff, the jury returned special findings in answer to interrogatories, in substance, that Miller did not die by reason of intemperance, from the use of intoxicating liquors, but that the cause of his death was congestion of the lungs and brain. A motion to set aside the verdict, on the ground that it is contrary to the evidence, was overruled. This ruling constitutes one of the grounds of the assignment of errors, and is the only one that need be considered by us.

The correctness of the instruction of the court below upon the point of law above stated is not questioned by appellant's counsel. Our duty will be fully discharged in passing upon the verdict viewed in the light of the evidence before the jury.

In our opinion the verdict cannot be sustained; it is palpably and grossly in conflict with the evidence, and could only have been rendered under the influence of passion or prejudice. Upon the question involving the cause of the death of Miller, the testimony points but one way; that he died from intemperance, in

the use of intoxicating liquors, there can be no honest reasonable doubt. There is nothing within the whole record that can be dignified into the importance of creating a conflict of evidence on this point. He was shown to have been an intemperate man for years, often given to paroxysms of gross intoxication. He would drink to insensibility, and protract these debauches until nature failed to supply strength necessary to enable him to continue his indulgences. He had seasons of sobriety which would continue for months. His debauches were not very protracted as to time, but most violent in excess. In one of these, after having spent two or three days at a "saloon" drinking, as was his wont on such occasions, and leaving it neither at night nor in the daytime, he was assisted home by the one who had dealt out to him the poisonous beverage, and supplied with a bottle of liquor to which he could have access at his own house. Soon after a physician was called in who found him suffering under an attack of *delirium tremens*. He rapidly grew worse and died from the disease. The physician testifies that his death was caused by the disease just named, which was the result of the intemperate use of intoxicating liquors. Not a single witness gives evidence contradicting the foregoing statement of facts. The only testimony that forms even the basis of an argument in support of the verdict of the jury is the affidavit of the physician, (the same who attended him in his last sickness,) to the effect that he died of exposure and intemperance. The affidavit was prepared and used to establish Miller's death upon application to the defendant for payment of the policy. The physician also, in his evidence at the trial, stated that he had died of congestion of the lungs and brain, caused by excessive indulgence in the use of intoxicating liquors. In explanation of the evidence it is shown that Miller, in his delirium, escaped from those having charge of him, and was thereby exposed in his underclothes, while running at large in the city, to the inclemency of the weather. It further appears that congestion of the lungs and brain was a consequence of his indulgence in intoxicating liquors, and was an attendant of the disease produced thereby. All that can be said of this evidence, giving it the weight and effect claimed by plaintiff's counsel, is that Miller died of congestion, or from exposure, both of which were the direct consequences of his intemperate use of intoxicating liquors. This conclusion sustains the defence that he died

Miller v. The Mutual Benefit Life Insurance Company.

from intemperance. Discredit is attempted to be attached to the evidence of the physician by the testimony of plaintiff as to certain statements made by him to her. He denies or explains these statements, and her evidence is unsupported. Of course the witness's testimony is unaffected by this attack.

Upon evidence of this character the jury based their special finding, that Miller did not die from intemperance, and their general verdict for plaintiff. These findings ought not to have been permitted to stand by the court below. For the error in overruling the defendant's motion for a new trial, on the ground that the verdict is contrary to the evidence, the judgment of the circuit court is

Reversed.

KENTUCKY.

STOKES & SON vs. COFFEY.

(8 Bush, 533. Court of Appeals, 1871.)

Insurance by insolvent debtor. Creditors. — An insolvent debtor, holding a life policy for \$10,000, payable to his representatives, procured it to be cancelled, and another policy issued in its stead, payable to his wife. *Held*, that if the premiums were paid out of his own means, the latter policy was void as to antecedent creditors.

An insolvent debtor insured his life for the benefit of his brother to secure him for certain debts due him, and to indemnify him as surety for debts due others. *Held*, that the debts due the brother, and the debts for which he was surety, should be satisfied out of the proceeds of the policy, and that the balance should be treated as assets of the insolvent. *Held*, also, that the preference of the brother was not fraudulent.

Rountree & Fogle, for appellants.

Harrison & Russell & Avritt, for appellees.

The opinion of the court was delivered by

[LINDSAY, J. B. S. Coffey, a few months before his death, insured his life for the sum of ten thousand dollars in the Kentucky Southern Mutual Life Insurance Company; also for the further sum of five thousand dollars in the St. Louis Mutual Life Insurance Company. The policies were made payable to his wife, Mrs. Elizabeth Coffey. He had previously taken out a life policy for ten thousand dollars in the latter company, payable to his representatives. This policy he procured to be cancelled and another issued in its stead, payable to his wife.] About the same time he procured another life policy for the further sum of ten thousand dollars, which he caused to be made payable to his brother, Joseph Coffey. [At the time this insurance was procured and the premiums thereon paid, Coffey was greatly indebted, in fact was upon the verge of bankruptcy.]

After his death his wife and brother compromised with the insurance companies, Mrs. Coffey receiving one half of the amounts of the policies made payable to her, and Joseph three thousand dollars on the policy payable to him.

Coffey's administrator instituted this suit to settle his estate in insolvency. The appellants, who were creditors of the intestate, made their joint answers a cross-petition against the widow and

brother in whose favor his life had been insured, and asked to subject the amount received by them on account of such insurance to the payment of their claims. They alleged that the premiums were paid by Coffey out of his own means; that the provision attempted to be made for his wife was unreasonable in view of his insolvency and indebtedness; that the policy made payable to the brother was a mere gratuity; and that the application of funds which ought to have been paid upon their debts to such purposes was fraudulent as to them, they being antecedent creditors.

The appellees do not controvert the insolvency of Coffey at the time he procured the insurance, but deny all fraud in the transaction. Joseph claims that the policy in his favor was intended to secure the payment to him of certain indebtedness due from his brother, and to indemnify him as surety on debts due to certain of his other creditors. Mrs. Coffey denies, in general terms, that the premium on the ten thousand dollar policy in the Kentucky Southern Mutual Company was paid by her husband out of his means, but she offers no rational explanation as to the source from which it was paid.

The circuit court upon hearing this branch of the cause adjudged that Mrs. Coffey should account for the amount of the premiums paid on the policies in her favor, and should be allowed to retain the money collected from the insurance companies as her own; that the debts due to Joseph, and the debts upon which he was surety, should be satisfied out of the money collected by him, and the balance treated as assets of his brother's estate. From this judgment the creditors have appealed, and Mrs. Coffey and Joseph prosecute a cross-appeal.

From the pleadings and evidence it may safely be assumed that the premiums upon all the policies (except that taken out in the Kentucky Southern Mutual Company) were paid by the intestate out of his own means; and that the amount secured by these policies to Mrs. Coffey was intended to be, and was in law, a voluntary post-nuptial settlement. The change of the policy originally made payable to the husband's representatives, so as to vest the title thereto in the wife, was a voluntary gift or assignment of a portion of the husband's estate, and was void as to his antecedent creditors. Revised Statutes, section 2, chapter 40; *Appeal of Elliott's Executors*, 50 Penn. 75; 1 Bigelow's Insurance Re-

ports, page 672. In failing so to adjudge, the circuit court clearly erred.

The rights of Mrs. Coffey under the two policies originally made payable to her cannot so easily be determined. The insurance was had and the intestate Coffey died in 1868, nearly two years before the passage of the act for the incorporation and regulation of life insurance companies, approved March 12, 1870; hence the rights of the parties to this litigation are not affected by the provisions of that act.

These two policies were never held or owned by the husband. The wife did not receive them from him by conveyance, assignment, or transfer. The husband's creditors therefore cannot reach the amounts realized on them under the provisions of our statute declaring voluntary assignments, &c, void as to antecedent creditors, nor indeed under any statutory enactment. One of these policies was, however, purchased by the debtor with his own means, and to the extent of the amount paid for it his estate was disabled from paying his debts, and his creditors were injured.

In the case of *Partridge v. Gopp*,¹ it was held "that no man has such a power over his property as that he can dispose of it so as to defeat his creditors unless for consideration." Kent.² This doctrine is perhaps broader and more comprehensive than is warranted by any adjudication ever made by this court. Yet voluntary dispositions by a debtor of his estate, whether it is such as can be reached by execution or other legal process or not, is by the common law fraudulent as to existing creditors, unless such dispositions be in the way of reasonable and proper advancements to his children, or a settlement upon his wife which a clear sense of moral duty requires him to make. Such advancements or settlements, to be upheld against antecedent creditors, must be characterized by the utmost good faith. The motives of the father or husband must be pure, and in carrying out a design tolerated by the liberality of the law rather than justified by strict morality, he must carefully abstain from any act tending to show a want of due regard for the rights of his creditors. In the case of *Doyle v. Sleeper, &c.* 1 Dana, 532, where the insolvent father purchased and paid for real estate with his own money, and caused the title to be conveyed to his children, Chief Justice

¹ Ambl. 596.

² *Quære?*

Robertson says that "indulgent as the spirit of the common law certainly is to the claims and obligations incident to the filial relation, it will not permit it to be prostituted or perverted as an instrument of fraud." The purchase was held not to be an advancement to the purchaser's children, but an attempted fraud upon his creditors, and the court subjected the property to the payment of their debts. Judge Underwood, in his separate opinion, takes even broader grounds than the chief justice, holding "it to be a fraud for the debtor after contracting the debt to disable himself so that he cannot pay it, by disposing of his money or property, which the law subjects to the payment of his debts, in such manner that it cannot be reached by the ordinary process of execution, unless the disposition be made in discharge of obligations legal or moral. I hold it to be fraudulent for a person to accept and hold as a gift the money or property of an insolvent debtor, and thereby defeat the payment of preëxisting debts."

In the case under consideration it is made to appear that the intestate intended to make a most unreasonable provision for his wife, and to wholly disregard the claims of his creditors. He was fully apprised of his inability to pay his debts when he undertook to secure to her, by the expenditure of his own means, an estate certainly of fifteen thousand, and very probably of twenty-five thousand dollars. In so doing he not only converted to her benefit, in the payment of the first premiums on the policies of insurance, money that in good conscience should have been paid to his creditors, but undertook that he would, during the remainder of his life, annually set apart out of his earnings for her benefit a similar amount. The circumstances connected with these transactions leave no doubt upon our minds that the insolvent husband had determined to provide for his wife and brother, and wholly to disregard the claims of his creditors. Under such circumstances a voluntary post-nuptial settlement cannot be upheld.

We would not be understood as intimating that an insolvent debtor may not insure his life for the benefit of his wife when she has no considerable estate of her own. But the amount of the policy ought to be no more than will be sufficient to enable her, in the event of his death, by the exercise of proper prudence and economy, to support herself and family, and to afford to their children the opportunity of securing reasonable educations.

It is true that Chancellor Kent, in the case of *Reeves v. Living-*

stone, 3 Johns. Chan. Rep. 497, in the application of the statute of 13 Elizabeth, held that no voluntary post-nuptial settlement was ever permitted to affect existing creditors, but we do not think the weight of authority will allow that statute an application so sweeping in its nature. We feel satisfied, however, that, independent of the statute, the common law will permit no such settlement to be upheld to the prejudice of antecedent creditors, however it may be made or whatever shape it may take, when it is tinctured with actual fraud.

In this case the settlement consisting of life policies, and not of a character of property which, if vested in the husband, could have been taken under execution, it is insisted that it cannot be reached even by a proceeding in equity. Judge Story lays down the rule to be "that a voluntary settlement of stock, or of *choses in action*, or of copyholds, or of any other property not liable to execution, is good, whatever may be the state and condition of the party as to debts." Story's Equity Jurisprudence, section 367.

The course of reasoning by which this doctrine is attempted to be sustained is attacked by Chancellor Kent, who maintains that equity should interfere, whether the property could be reached by execution or not, to prevent debtors from converting their property into stocks, *choses in action*, &c., and settling it upon their families in defiance of their creditors, and to the utter subversion of justice; *Bayard v. Hoffman*, 4 Johnson's Chancery Reports, 452; and in a note to section 358 of Story's Equity Jurisprudence (fifth edition) the author admits that the cases cited by Kent go very far to establish the doctrine asserted by him, and adds that "whatever may be the true doctrine on this subject, a distinction may perhaps exist between cases where a party indebted actually converts his existing tangible property into stock, to defraud his creditors, and cases where he becomes possessed of the stock without indebtedment at the time, or, if indebted, without having obtained it by the conversion of other tangible property into stock. Where tangible property is converted into stock to defraud existing creditors, there may be a solid ground to follow the fund, however altered."

Since under our laws property, whether tangible or intangible, may be subjected by the creditor to the payment of his debt by proceedings in equity, we can perceive no sufficient reason why

we should not recognize this distinction. The English courts have ceased to observe it since the passage of their insolvent debtor's act. *Norcutt v. Dodd*, Craig & Phillips, 100. The injury to the creditor is equally as great in the one case as the other. Besides this, as money may be seized and sold under execution, where the officer can without violence possess himself of it, it may be regarded as tangible property. Having no earmarks, it loses its individuality by circulation, and therefore cannot be followed into the hands of the fraudulent grantee. This fact is of itself a sufficient reason why the stock or other thing of value into which it may have been fraudulently converted should be seized by the chancellor in the hands of the fraudulent grantee, and subjected to the payment of the grantor's debts. This doctrine was recognized by this court in the case of *Crózier v. Young*, 3 T. B. Monroe, 158, where the father converted his money into stock in the Center Bank of Kentucky in the name of his children. The court refused to subject the stock to the payment of the plaintiffs' claims because they were subsequent instead of antecedent creditors, holding that the common law does not, like the statute against fraudulent conveyances, protect the interests of subsequent as well as precedent creditors. But even according to the rules of the common law these appellants are entitled to relief, they being antecedent creditors. The circuit court should therefore have adjudged the application to the payment of their claims the moneys collected by Mrs. Coffey on the ten thousand dollar policy in the St. Louis Mutual Company, which she admits was purchased by her husband with his own means.

The denial by Mrs. Coffey that the premium paid on the policy in the Kentucky Southern Mutual Company was paid out of the funds of her husband is by no means explicit, but was accepted as sufficient by the appellants. She offers no rational explanation as to what funds were applied to the payment of this premium; but inasmuch as she is in possession of the proceeds of the policy which was made payable to her, and appellants have not proved the payment of the premium out of the husband's means, we do not feel authorized to adjudge that she shall be required to surrender the money thus realized to the payment of the intestate's debts.

The judgment of the court below as to Joseph Coffey must be affirmed on both the original and cross-appeals. The insurance,

Stokes v. Coffey.

in so far as it was intended to secure the payment of what his brother owed him, and to indemnify him on account of his suretyship, had the effect of preferring him to other creditors. Such preference is not and has never been held actually fraudulent. As to the excess of the policy over the amount necessary to secure these ends, it was a mere gratuity, which he ought not to have been allowed to hold against such of his brother's creditors as saw proper to apply to the chancellor for the relief sought by these appellants.

Upon the return of the cause the court below will apply to the payment of the debts due from the intestate to these appellants such balance as may remain in the hands of Joseph after paying the debts due to him and those upon which he is surety. It will also apply to the same purpose such portion of the moneys collected by Mrs. Coffey on the two policies in the St. Louis Mutual Company as may be necessary to satisfy said claims in full.

Judgment as to Elizabeth Coffey *reversed*, and cause remanded for further proceedings in accordance with the principles of this opinion. Upon the cross-appeal the judgment is

Affirmed.

LOUISIANA.

In the matter of the SUCCESSION OF P. A. KUGLER.

(23 La. An. 455. Supreme Court, 1871.)

Title to policy.—A policy of insurance on the life of a man, taken out in favor of his wife and children, vests the right to the policy in them from the date of its execution.

APPEAL from the parish court of East Baton Rouge. G. M. Husted, parish judge.

S. P. Greves, for administrator, appellee.

A. S. Herron & Favrot & Lamon, for opponents and appellants.

LUDELING, C. J. This is an appeal from a judgment homologating the final account of the administrator of the succession of P. A. Kugler.

The administrator has filed an answer, praying that the judgment in his favor be amended by allowing the widow and minors one thousand dollars under the homestead act of 1852.

The evidence in the record shows that the life of the deceased was insured in favor of his wife and children, and that they received one thousand dollars from the insurance company after his death. It is contended by the counsel for the administrator that at the moment of the death of Kugler the widow and children were in indigent circumstances, and that the subsequent payment of the policy did not affect their rights, under the law, at the period of the husband's death.

We think the rights of the widow and children to the policy existed before the death, and that the liability of the insurance company became fixed and exigible by the death of the insured, and, therefore, the widow and children owned, in their own right, one thousand dollars when Kugler died.

JANE WETMORE vs. MUTUAL AID AND BENEVOLENT LIFE INSURANCE ASSOCIATION OF LOUISIANA.

(23 La. An. 770. Supreme Court, 1871.)

Time of forfeiture. Days of grace.—One of the clauses in the policy of a life insurance issued by the Benevolent Aid and Life Insurance Company of Louisiana was, that the

Wetmore v. Mutual Aid and Benevolent Life Insurance Association of Louisiana.

insured agreed to pay into the treasury of the association one dollar and twenty-five cents upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French for five consecutive days. *Held*, that under this clause the assured was allowed the entire thirty days commencing and counting from and after the last of the five days of publication; and that the company could not claim the forfeiture of the policy on that account until thirty days after the last of the five days of publication had expired.

APPEAL from the Eighth District Court, parish of Orleans, Dibble, J.

T. A. Bartlette, for plaintiff and appellee.

J. D. Hill & H. N. Ogden, for defendants and appellants.

TALIAFERRO, J. On the third of June, 1870, the defendants insured the life of Robert Hancock Wetmore, who died on the ninth of September following. This suit is brought by the widow of the decedent to recover on the policy the sum of \$2,935, the amount insured for, and interest on that amount at five per cent. from ninth November, 1870. The answer admits that the policy of insurance was taken out as stated, but defendant avers that the insured party having failed to comply with one of the conditions stipulated in the policy, the act became void, and that defendant is not bound. The judgment of the lower court was rendered in favor of the plaintiff for the sum claimed, and the defendants have appealed.

The condition referred to in the defence reads thus: "Said Robert Hancock Wetmore hereby agrees to pay into the treasury one dollar and twenty-five cents, upon the death of any member of the association, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French for five consecutive days."

The company say that this assessment on Wetmore, made on the decease of Joseph Parisey, was due and unpaid until the expiration of the thirty days, at the end of which time the policy became forfeited, so that on the ninth September, 1870, (the day of Wetmore's death,) the policy by its terms and conditions was null and void, and consequently no rights of any sort arose in favor of the plaintiff. The case turns upon the solution of the question, from what day does the thirty days begin to run? If the thirty days begin to run from the first day of publication, the time had elapsed before Wetmore's decease. If the commence-

Wetmore v. Mutual Aid and Benevolent Life Insurance Association of Louisiana.

ment be on the last day of publication, the full period of thirty days did not elapse until after his death.

If the time begin to run from the first day of publication, why should the publication be required to be made for five days consecutively? The reason for requiring five days' publication would seem to be that this repetition of the publication for five days would be more likely to bring to parties interested knowledge of the event published, than a single insertion in the gazette. Taking, then, this construction of the clause stipulating the condition as correct, the publication five times is to be considered the notice, and to be deemed equivalent to notice served personally. Therefore the last day of publication, and not the first, is the period from which the thirty days begin to run. It was upon this, and as we think the correct view of the question, the judge *a quo* decided in favor of the plaintiff.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

MARYLAND.

H. A. WISE vs. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY.

(34 Md. 582. Court of Appeals, 1871.)

Warranty. Non-disclosure of immaterial fact. — Where in answer to the question, “Has the party had any sickness within the past ten years?” the insured replied that he had had pneumonia, and said nothing of a slight attack of chronic pharyngitis several years before; and where the policy provided that the answers to the application were the basis of insurance, and that if they were in any respect untrue, the policy should be void, *held*, in the court below, that this did not constitute a warranty, and that the slight attack mentioned was an immaterial fact which the insured was not bound to disclose. Judgment affirmed on appeal.

Military service. — The insured was asked if he had been employed in any military or naval service; to which he replied in the negative. There was some evidence that he had been a chaplain in the Confederate army. The court below was asked to instruct the jury that if the insured had been a chaplain in the Confederate army this question had been improperly answered, and that there could be no recovery; but that court refused to do so. Judgment affirmed on appeal.

Declining a proposal. — The insured in this case was asked if any company had declined to insure his life, to which he answered No. There was evidence that previously the deceased had been examined for insurance in another company, and that the physician had reported him in good health, but that his weight was below the standard; that an application had been made and sent on without the knowledge of the deceased, and directions given by the company’s home agent that it be withdrawn; the sole reason assigned for not passing upon it, being that the deceased was under weight. *Held*, in the court below, that a prayer that the court should instruct the jury as matter of law upon these facts, that there had been a declining to insure the deceased, must be refused. Judgment affirmed on appeal.

Medical examiner. Formation of opinion. — In an action on a life policy, the medical examiner of the company who had recommended the risk in 1867, having testified that in a conversation with the assured he had spoken of his great powers of endurance, and of his capability of performing considerable feats of pedestrianism, was asked: “If you had known that the assured had been so far weakened or prostrated by his pulpit services in the morning, in Philadelphia, (in 1860 or 1861,) that he was unable to attend in the afternoon, would that have influenced you in making up your opinion about recommending him, while he was informing you about his great powers of physical endurance?” *Held*, that the question was irrelevant, and therefore inadmissible.

APPEAL from a judgment of the circuit court for Howard County. See *ante*, vol. 2, p. 46.

The case is stated in the opinion of the court, *infra*.

Ed. Otis Hinkley & Wm. M. Merrick, for the appellant.

Wm. S. Waters & I. Nevett Steele, for the appellee.

GRASON, J., delivered the opinion of the court.

Wise v. The Mutual Benefit Life Insurance Company of New Jersey.

The record in this cause contains two exceptions: the first, taken to the ruling of the court below in excluding from the consideration by the jury the evidence therein set out; and the second, to the rejection of ten of the eleven prayers offered by the appellant, its first prayer having been conceded. The rejected prayers all relate to certain answers made by Henry A. Wise, Jr., to questions five, eleven, and fifteen, put to him before the policy was issued by the agent of the appellant. The appellee, by her declaration in writing, dated the seventeenth day of May, in the year 1867, (the same day the policy bears date,) and filed with the application, declared that the age of said Henry A. Wise, Jr., at his next birthday thereafter, would be thirty-three years; that he did not, to the best of her knowledge and belief, practise any bad or vicious habit that tended to shorten life, and that she had an interest in his life to the full amount of \$20,000; and she thereby agreed that the answers of the said Henry A. Wise, Jr., and those of his friend and physician, should be the basis of the contract between herself and the company, and that if any untrue or fraudulent allegation should be contained in those answers or in said declaration, all moneys which should be paid to the company on account of the insurance, made in consequence thereof, should be forfeited for the benefit of the company. The policy contains a stipulation that it shall be void if "the declaration made by the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue."

The fifth, eleventh, and fifteenth questions, to which the prayers refer, and the answers thereto, are as follows: "5. Has the party been or is he now employed in any military or naval service?" The answer was "No." "11. Has the party had *any* sickness within the last ten years; if so, what?" The answer was, "Pneumonia in 1862." "15. Has any company declined to insure the party; if so, what company, when, and for what reason?" The answer was "No."

The contract between the parties having been entered into upon the basis of the truth of these answers, it becomes necessary to ascertain whether they constitute warranties, which cast upon the assured the onus of proving the literal truth of them, or whether they are representations merely, and if representations, whether their materiality, as well as their truth, is to be passed upon by the jury. We have carefully examined and considered

Wise v. The Mutual Benefit Life Insurance Company of New Jersey.

the authorities referred to in the argument, and are of opinion that the true rule of construction of contracts like this is that adopted and acted upon in the cases of *Anderson v. Fitzgerald*, 4 House of Lords' Cases, 503-514,¹ and *Campbell v. New Eng. Ins. Co.* 98 Mass. 381.² Both of those cases presented questions almost identical with those raised in this case, and in each of them it was held that the answers were not warranties, but representations made material by the agreement of the parties, and, therefore, that their truth alone was open to the consideration of the jury. In those cases, it was also held that it was not incumbent upon the insurer to show that the answers were morally false, but that if they were shown to be simply untrue, it would be sufficient to defeat the plaintiff's action. Being satisfied that those cases announce the true rule of construction of such contracts as the one before us, we will now proceed to consider the prayers. The second, third, ninth, and tenth prayers refer to the eleventh question and answer. Upon the theory of these prayers, notwithstanding the jury might find that Mr. Wise's answer that he had pneumonia in 1862, was true, yet their verdict must have been for the appellant, if they further found that he had had "chronic pharyngitis" within the ten preceding years, and that he had not communicated that fact, and that he had been treated therefor by a physician, however innocent he may have been in making said answer. By the tenth question, Mr. Wise's attention had been directed to certain diseases, specifically enumerated therein, and had been asked if he had had any of those diseases, and upon his replying in the negative, he was asked by the eleventh question if he had had any sickness within ten years. It is not alleged that the answer to this question, as far as it went, was untrue, but it is contended that it ought to have gone further and disclosed the fact that he had had "chronic pharyngitis" in 1860 or 1861. There is evidence in the record to show that pharyngitis is an inflammation of the throat, and, when slight, not to be called a sickness, and not likely to shorten life. If the policy in this case is to be avoided by the fact of Mr. Wise having had this affection in 1860 or 1861, and by his not having disclosed that fact in his answer, then, if he had suffered from any slight indisposition or sickness within the same period, and had failed to

¹ *Ante*, vol. 2, p. 341.

² *Ante*, vol. 1, p. 229.

Wise v. The Mutual Benefit Life Insurance Company of New Jersey.

communicate that fact in answer to the eleventh question, the policy of insurance would have been made void. His attention having been directed by the tenth question to certain diseases particularly named therein, Mr. Wise may have very naturally supposed that the eleventh question had reference to diseases or sicknesses of the same class, and like importance. It will be recollected that pharyngitis is not named in either the tenth or eleventh questions, and that there was proof to show that it is an affection slight in its character and effects; and if, as matter of law, a policy is to be avoided, if a party insured is shown to have had it some six or seven years before insurance, and that he failed to make it known in answering a question like the eleventh, then policies on lives, where the truth of answers to questions is made the basis of the contracts, would be mere devices by which insurance companies could obtain money, by way of premiums, without becoming liable upon the policies issued to the insured. The four prayers now under consideration were therefore properly rejected, because they did not leave it to the jury to find, from all the evidence before them upon this matter, whether "chronic pharyngitis" was a "sickness" in contemplation of the parties in putting and answering the eleventh question, in addition to the other facts which these prayers required the jury to find.

The eleventh prayer denied the appellee's right to recover if the jury should find that Mr. Wise was a chaplain in the Confederate army in the year 1862. The only evidence as to this point was a statement of Mr. Haxall, who, without being inquired of about the matter, so testified at the trial below. The fifth question put to Mr. Wise, and answered by him in the negative, was: "Has the party been, or is he now *employed* in any military or naval service?" There is no evidence to show whether a chaplain in the army is or is not in fact in the *military service*, and none to show that Mr. Wise was ever actually *employed* in said service, even if a chaplain can be said to be in the military service. He may have held the position of chaplain without having been ever actually employed. The onus of proving such employment was upon the appellant, and it was a question properly and exclusively for the jury to pass upon; and as the eleventh prayer did not submit to the finding of the jury either the question whether a chaplain in the army is in the military service, or the question whether Mr. Wise, if in the military

service, was ever actually *employed* in such service, it was properly rejected.

The fourth, fifth, seventh, and eighth prayers refer to the fifteenth question and answer. In answer to the question whether any company had declined to insure Mr. Wise's life, he said "No." He had in fact made application to Mr. Bresee, general agent at Baltimore of the Mutual Life Insurance Company of New York, for insurance in that company. Mr. Bresee sent on to the president of his company, in the same letter, the applications of Macmurdo, Staley, and Wise, and several days afterwards received a reply from the vice-president of the company in the following words, viz:—

"I have received your letter dated 1st May. I inclose policy No. 62,413, Macmurdo \$36.13

"Staley Declined.

"Wise Returned, see mem."

The proof shows that Macmurdo's policy was granted; that "declined" opposite Staley's name indicated that his application had been finally acted upon and rejected, and that the memorandum referred to in the letter as made upon Mr. Wise's application was the word "returned" or "withdrawn," which indicated that his application might be reconsidered. Dr. Donaldson, the examining physician of the New York company, had reported that Mr. Wise's weight did not correspond with his height by forty pounds.

Mr. Bresee proved that Mr. Wise did not know that his application had been sent on to New York; that he had no means of knowing; that after it was returned from New York, he sent a message to Mr. Wise, that his company had some rules about a man's weight corresponding with his height, and that he thought there might be some difficulty or doubt about his application passing, and advising him to withdraw it, and that Mr. Wise sent a message in reply, that he would not take a policy if the company would give it to him; that he would not insure in a company having such nonsensical rules.

Mr. Winston, the president of the New York company, was twice asked, upon his examination, whether Mr. Wise's application had been declined by his company, without eliciting a reply in the affirmative. The fourth and seventh prayers asked instructions, in substance, that if Mr. Wise did not make known,

Wise v. The Mutual Benefit Life Insurance Company of New Jersey.

in answer to the fifteenth question, the facts connected with his application to the New York company, the plaintiff was not entitled to recover. The court below was right in rejecting those two prayers, because they did not submit to the jury to find, upon all the evidence in relation thereto, whether any other company had *declined* to insure Mr. Wise's life. That was a question exclusively within the province of the jury to pass upon. For the same reason, the fifth prayer, which asked the court to say, as matter of law, that the above facts amounted to a declining of Mr. Wise's application, was also properly rejected. The sixth and eighth prayers do not deny the appellee's right to recover upon the ground of any want of truth in Mr. Wise's answer to the fifteenth question, but upon the ground that it was the duty of Mr. Wise to have disclosed to the appellant all the facts connected with his application to the New York company and its return and fate. In other words, the sixth and eighth prayers are based, in effect, upon the theory of a fraudulent concealment by Mr. Wise of facts, which good faith and fair dealing required him to disclose. Mr. Bresee testified that Mr. Wise did not know that his application had been sent on to New York; that he had no means of knowing; that he had never seen Mr. Wise after his application had been made out, and that he thought he had returned Mr. Wise's application to him, as he had not been able to find it at his office. If Mr. Wise did not know that his application had been presented to and considered by the New York company, but believed that the suggestion for its withdrawal came from Mr. Bresee alone, for the reason that Mr. Wise's weight did not correspond with his height, how can it be said that there was any concealment of facts, or want of good faith in not disclosing them? The prayers should have left it to the jury to find whether or not, upon all the evidence before them, Mr. Wise knew all the facts connected with said application, its return and fate, and knowing them, concealed them. Not having submitted that question to the jury, the sixth and eighth prayers were properly rejected.

We think that the evidence set out in the first bill of exceptions was clearly inadmissible. Whether Mr. Wise was so fatigued by the morning services in 1860 or 1861, that he had to omit services in the afternoon and have them in the evening, or whether, if such were the fact, it would have influenced Dr.

Emerick v. Coakley.

Hartman, if known to him, in making up his opinion about recommending him for insurance in 1867, we are at a loss to perceive how the questions at issue between the parties to this case can be affected by it. Mr. Wise was asked no question in regard to it; there is no evidence to show that such a thing ever occurred after he left Philadelphia, even if it occurred there, upon which point the evidence is conflicting; it was irrelevant, and therefore inadmissible.

The only remaining question to be noticed arises from the refusal of the superior court of Baltimore city to remove the case to the circuit court of the United States upon the petition of the appellant. It conclusively appears that Mrs. Wise, the appellee, was a citizen of the State of Virginia at the time of the institution of the suit, and therefore the provisions of the act of Congress, authorizing removals from the state to the federal courts, do not apply.

Finding no error in the rulings of the court below, its judgment must be affirmed.

Judgment affirmed.

CATHERINE V. EMERICK vs. DANIEL COAKLEY & others,
trading as Coakley Brothers.

(35 Md. 188. Court of Appeals, 1871).

Assignment. — An assignment by a wife and her husband, for the benefit of his creditors, of a policy of insurance on his life, obtained for her sole and separate use, and made payable to her and her assigns, is valid.

The forbearance of the creditors of the husband, and the granting an extension of time for the payment of his debts, is a valid consideration for an assignment by the wife.

APPEAL from the circuit court of Baltimore city.

In 1869 William H. Emerick, and Catherine V. Emerick his wife, assigned a policy of life insurance upon the life of the former, for the sole and separate use of the latter, in the Charter Oak Life Insurance Company, to Coakley Brothers, for the purpose of securing to them the payment of certain notes of William H. Emerick, given in liquidation of an indebtedness of the firm of which he was a member, and in consideration of an extension of time for the payment of the same. In 1870, William H. Emerick died, and thereupon his widow and Coakley Brothers both claimed the whole amount of the insurance, the latter, however, agreeing to pay over to the widow the balance remaining after the settlement

Emerick v. Coakley.

of the liquidated indebtedness of the decedent to them. The insurance company filed a bill of interpleader against both parties, and paid the money into court. The widow was then made complainant, and Coakley Brothers defendants, and after proceedings, a final decree was passed adjudging to Coakley Brothers the amount of their claim, and the balance, after paying costs, to Mrs. Emerick. From this decree the latter appealed.

The cause was argued before Bartol, C. J., Stewart, Brent, Bowie, and Grason, JJ.

Sebastian Brown & William A. Fisher, for the appellant.

Bernard Carter & Thomas M. Lanahan, for the appellees.

GRASON, J., delivered the opinion of the court.

The question presented upon this appeal is, whether the assignment by the appellant and her husband to the appellees of a policy of insurance on her husband's life, obtained for her sole and separate use, is valid.

Its validity is questioned upon several grounds, and first, because it was not understood by the appellant, and was without consideration.

We have carefully examined and considered the evidence contained in the record, and we think that it clearly shows that the firm of Ross & Emerick, of which William H. Emerick, the husband of the appellant, was a member, was indebted to the appellees, and that in order to obtain an extension of time for payment, he proposed to them to give his individual notes for the payment thereof, to be secured by an assignment of the life policy. This offer was accepted by the appellees; the notes were given, the assignment was prepared and fully explained to the appellant, who thereupon freely and voluntarily executed it, and in view of these facts, it cannot be said that she did not fully understand the nature and effect of her act.

An agreement to forbear, for a time, proceedings at law or in equity to enforce a well-founded claim is a valid consideration for a promise. 1 Parsons on Cont. 365 (5th ed. 440). Nor is it material that the party making the promise, in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay; for the benefit to the defendant will be supposed to extend to him, and it would be enough to make the consideration valid, that the creditor is injured by the delay. 1 Pars. on Cont. 368 (5th ed. 443). The

Emerick v. Coakley.

forbearance of the appellees, and the granting to William H. Emerick an extension of time for payment of the debt, constitute a good and valid consideration for the assignment, and it must be supported unless there is some statute or principle of law which forbids it.

That a wife may assign or incumber her separate property for her husband's debt is fully established by the decisions of this court in the cases of *Tiernan v. Poor*, 1 G. & J. 216; *Brundige et al. v. Poor*, 2 G. & J. 1; *Price v. Bigham*, 7 H. & J. 296; *Berrett v. Oliver*, 7 G. & J. 191.

But it is said that an assignment of a life policy is not authorized by sections 8 and 9 of article 45 of the Code, inasmuch as those sections are, in their nature and character, enabling, and do not expressly authorize the wife to assign the policy. It is true that the wife was not, before the enacting of those sections, authorized to insure the husband's life; yet, those sections must be construed with the other sections of the same article, as well as with reference to the decisions of this court in regard to the rights of married women to, and disposition of, their separate property. By section 11 of article 45, they are empowered to dispose of their separate property, both real and personal, by conveyance, in which their husbands join; and, therefore, it was not necessary, in sections 8 and 9, to again give the power of disposition, which they already possessed, with respect to all their property of every description, under section 11. In the case of *The New York Life Insurance Co. v. Flack*, 3 Md. 341-354,¹ this court has said that a life policy is like any *other chose in action*, assignable by the person in whose favor the contract is made. See also *Harrison v. McConkey*, 1 Md. Chan. Dec. 34;² *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed's Rep. 269.³ It has also been held by this court that a married woman may act as a *feme sole* with reference to her separate property, and that the right to dispose of it accompanies the ownership, unless she is restrained from so doing by the *express language* of the instrument under which she holds. *Cooke v. Husbands*, 11 Md. 503, 504-507; *Koontz v. Nabb*, 16 Md. 549; *Michael v. Baker*, 12 Md. 169; *Chew v. Beall*, 13 Md. 360. So far from an assignment being prohibited by the terms of this policy, the amount of the insurance is made

¹ *Ante*, vol. 1, p. 146.² *Ib.* p. 144.³ *Ib.* p. 709.

payable to her *and her assigns*, and the insurance company, by which the policy was issued, has indorsed thereon its approval of the assignment, made by the appellant and her husband to the appellees.

It is urged, however, that the power given to the wife to insure the life of the husband for her sole use was intended to provide the means of support for the wife and the children after the husband's death, and that, therefore, such a policy stands upon a different footing from all other separate property of the wife, and that an assignment of it is against public policy; and the case of *Eadie v. Slimmon*, 26 New York Reps. 11, 15, 17, 18,¹ is relied upon as conclusive authority upon this point, especially as the statute of New York, in regard to such life policies, is substantially the same as ours. In view, however, of the 11th section of article 45 of the Code, and the decisions of this court respecting the disposition by married women of their separate property, to which we have before referred, we cannot recognize the decision in *Eadie v. Slimmon* as law in this State. We think that the correct rule of law is announced in the case of *Pomeroy v. Manhattan Life Ins. Co.* 40 Ill. Reps. 402.² In that case, a policy was issued to the wife upon her husband's life, payable to her and her assigns, and during the husband's life she assigned \$600 of the amount to a creditor of the husband, to secure the payment of the debt. After her husband's death, the widow and the assignee both claimed payment; the widow of the whole amount insured; and the assignee the amount assigned to him; the insurance company filed a bill of interpleader, and the decree was in favor of the assignee; so that the facts in that case are almost identical with those in the case now before us. The widow appealed, and the decree was affirmed, and Chief Justice Walker, in delivering the opinion of the court, after reciting the provisions of the Illinois statute, which is very similar to section 11 of article 45 of our Code, says: "The application for this policy was in the name of Mrs. Pomeroy, and it was issued to her, and it is not denied that it was her sole and separate property, and if so, under this act it was at her disposal and under her control, and no reason is perceived why her assignment to appellee was not binding in equity, and if so, she cannot repudiate her act. Under

¹ *Ante*, vol. 1, p. 567.

² *Ib.* p. 46.

Emerick v. Coakley.

the statute, she is entitled to the benefits it confers, and must be held liable for her acts performed in pursuance of the authority it confers."

But it was also contended, upon the authority of *Godsall v. Boldero*, 9 East, 72, that a life policy is a contract of indemnity, and therefore is not assignable until the loss has occurred, — that is, until after the death of the party upon whose life the policy is granted.

The decision of Lord Ellenborough in that case has been reviewed and overruled in the cases of *Law v. The London Indisputable Life Policy Company and Robertson*, 1 Jur. N. S. 180,¹ and *Dalby v. The India and London Life Ins. Co.* 80 Eng. C. L. Reps. 386.² In the latter case, Parke, Baron, in delivering the opinion of the court, says: "The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the payment of a certain annuity for his life; the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. *This species of insurance in no way resembles a contract of indemnity.*"

The doctrine upon this point, as announced in *Godsall v. Boldero*, seems also to have met the decided disapproval of this court in the case of *Whiting, use of Sun Mutual Ins. Co. v. Independent Mutual Ins. Co.* 15 Md. 326.

We are of opinion that the decree of the court below is correct, and it will be affirmed.

Decree affirmed.

STEWART, J., dissented.

See *Connecticut Life Ins. Co. v. Burroughs*, 34 Conn. 305; *S. C.*, ante, vol. 1, p. 63; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *S. C.*, ante, vol. 1, p. 261.

¹ *Ante*, vol. 2, p. 404.

² *Ib.* p. 371.

MICHIGAN.

THE CONTINENTAL LIFE INSURANCE COMPANY OF NEW YORK *vs.* HARRIET E. WILLETS.

(24 Mich. 268. Supreme Court, 1872.)

Agency. Credit. Payment. — A sub-agent, employed by the agent of an insurance company to solicit applications for insurance, collect premiums, and deliver policies, has no general authority, by virtue of such employment, to give credit or receive anything but cash in payment.

Agency. Premium. — Where an application for insurance provides that any neglect to pay the premium when due shall render the policy void, and forfeit all payments made thereon, and that the policy shall not be binding upon the company until all premiums due thereon shall be received by the company, or some one authorized to receive the same, and during the lifetime of the insured, the insurance company is not liable on a policy which has not been delivered, upon evidence that a sub-agent of its agent has, without its authority, taken from the insured a promissory note of a third person in part payment of the first premium, in the absence of any showing that such sub-agent was allowed to substitute his own personal liability to the company in place of the premiums.

Part-payment. Credit. Presumption. — The payment of a part of the premium upon a policy based upon such an application does not, by itself, raise a presumption of an understanding that time was to be given for the payment of the balance.

Evidence. — Where a witness for plaintiff has testified to certain admissions as having been made by defendant's agent in the course of a conversation, it is competent for defendant to prove, by another witness, who was present immediately after such admissions were alleged to have been made, and while the conversation continued upon the same subject, subsequent statements by such agent, which, though not directly contradicting the alleged admissions, would have a tendency, if believed, to convince the jury that such admissions were not in fact made as testified to by the prior witness.

ERROR to Wayne circuit.

Harriet E. Willets brought this action in the court below against the Continental Life Insurance Company of New York, upon a policy of insurance issued by said company upon the life of her husband, William J. Willets. The opinion contains a sufficient statement of facts as to all the questions decided, except that of the admission of the evidence of Gray. One De Witt C. Johnson testified on behalf of the plaintiff that on the morning after the death of Mr. Willets he was in the office of Messrs. Tenwinkle & McCune, the defendant's agents, and there met Mr. Tenwinkle, and inquired of him whether Willets

The Continental Life Insurance Company of New York v. Willets.

had taken his policy, to which Tenwinkle replied that he had taken a note for a part of the premium. On cross-examination, he testified that Charles B. Gray (the soliciting agent who had taken said note) came in soon after this conversation, but that Tenwinkle did not, in his presence, ask Gray if he had given up that note. The defendant's counsel called said Gray as a witness, and asked him whether Tenwinkle did not, on that occasion, in the presence of Johnson, ask him if he had given up the note to Willets previous to his death. Objection being made to this question, the defendant's counsel stated that they proposed to prove that Tenwinkle then and there asked Gray, in Johnson's presence, whether he had given up the note to Mr. Willets, and that Gray made the reply that he had not, with the explanations why he did not. The objection was sustained, and the defendant excepted. The verdict was for the plaintiff, and judgment was rendered accordingly. The defendant brings the case up on writ of error.

C. I. Walker, for plaintiff in error.

Wilkinson & Post, & Ashley Pond, for defendant in error.

COOLEY, J. The defendant in error, who was plaintiff below, brought action upon a policy of insurance, by which the life of her husband, William J. Willets, was insured in her favor. The issue of the policy by the company, and its transmission to their general agents in Detroit, in whose hands it was at the time of the death of Willets, were not in dispute. The application for the policy contained the following clause immediately preceding the signature of the applicant: —

“ It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statement shall form the basis of contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the health (or in regard to any pecuniary interest which the insurer may have in the life) of the party insured; any neglect to pay the premium on or before the day it became due, will render the policy null and void, and forfeit all payments made thereon; also that the policy of insurance hereby applied for shall not be binding upon the company until the amount of all premium and premiums, as stated therein, which shall be due or overdue, shall be received by said company, or by some person authorized to receive the same, and during the lifetime of the party herein insured.”

The Continental Life Insurance Company of New York *v.* Willets.

It was claimed by defendant on the trial that the first premium upon the policy had never been paid by the insured, and that consequently the plaintiff had never become entitled to the policy or to maintain action upon it. The plaintiff claimed, on the other hand, that all of the first premium, except twelve dollars, had been paid in a promissory note against one Wilkie, delivered to and accepted by one Gray, who is claimed to have had authority to receive the same as payment, and with whom it is also claimed there was an understanding, express or implied, for some credit for the remaining twelve dollars.

Gray, it appears, was a sub-agent employed by Tenwinkle & McCune, the general agents of the defendant at Detroit, as solicitor, and to deliver policies and collect premiums. There was no dispute that when the policy in question was sent on by the company to their general agents, it was delivered to Gray to collect the premium thereon and then to deliver the same to the insured; that he then called upon Willets, and on the latter expressing his inability to pay, he took from him the Wilkie note. The understanding on which he took the same was in dispute; it being claimed on the one side that it was to constitute payment to the amount due upon it if Gray found it satisfactory, and that he did find it satisfactory, and retained the same; while on the other side it was insisted that Gray took it for the purposes of inquiry merely; that the result of the inquiries was not satisfactory, and that he had endeavored to return the note to Willets previous to his death. The defendant also denies the authority of Gray to bind them by any agreement either to take a note or to give credit.

The case was put to the jury by the circuit judge upon the theory that under the undisputed facts of the case, Gray had authority to make the arrangement claimed by the plaintiff to have been made, and that the question for the jury, therefore, was whether he did make it or not. The charge was:—

“If the note for forty-two dollars, given in evidence, was delivered to, and accepted by Gray, as payment in part of that portion of the premium payable down, and there was an understanding, express or implied, between Gray and William J. Willets that the residue of said portion of the premium should be paid to said Gray at some future time, then Gray at once became indebted to his principals, Tenwinkle & McCune, for

such premium, and they to the defendant, and as between plaintiff and defendant said premium was paid and the policy delivered to her."

If Gray could bind the company by such an arrangement, it must be either because expressly authorized, or because the course of business of the defendant was such as to warrant an implication of authority upon which third persons would be authorized to act. A sub-agent, employed by the agent of an insurance company to solicit applications for insurance, collect premiums, and deliver policies, has certainly by virtue of such employment no general authority to give credit, or receive anything but cash in payment. This is too plain to require the citation of authorities.

That any express authority was given in this case is not claimed; but the plaintiff insists that the course of business in the office of the general agents of defendant was this: When a policy, which had been applied for was received, it was delivered to the sub-agent who had solicited the same for the collection of the premium, who was at the same time charged with the amount of the premium; that he was allowed to make such arrangement as he pleased with the party to be insured, the company looking to him for the premium; and that in all his dealings with such party, he acted as principal, the company not being concerned in his arrangements, but looking to him for the money or the return of the policy, and it being indifferent to them whether any payment had, in fact, been made to the agent or not.

The evidence relied upon to make out this course of business was that of the agent, Tenwinkle, and of the sub-agent, Gray. Gray testified that he was employed by Tenwinkle & McCune, the general agents, and not by the company; that his duties were soliciting, taking applications, returning them to the office of the general agents, receiving from them policies upon which he was to collect premiums, and then delivering them; that he had no authority to receive anything in payment for premiums except money, and if he accepted anything else, it was on his own responsibility, and he paid the money himself; that he was paid by the month for his services; that when a policy was received, a note was made that it had been delivered to him and he was liable to the company; that previous to this transaction, he had never taken a note of any one on a premium, and if he gave

credit, he paid over the money himself and took the chances of collecting it.

Tenwinkle testified that they had no authority from the company to take notes on premiums, but had done so sometimes, discounting them themselves, and accounting to the company for the money; that when policies were received by them, they were held responsible to the company for either the money or the return of the policies; that when they delivered a policy to the soliciting agent and he did not return it, he accounted to them for the premium in money, or something they would accept as money, and if he paid money they were satisfied, and did not inquire what he took of the insured.

To support the theory of the plaintiff, there should have been some evidence showing, or tending to show, that the sub-agent was allowed, at his option, to substitute a personal liability of his own to the company in the place of the money which he was to collect as premiums; the company being content to look to him as its debtor for any amount which he saw fit to arrange otherwise than by actual payment in cash, with the parties applying for insurance. For the purpose of disposing of the case on this record, it is sufficient to say there is no such evidence. The company appear to have taken care to provide against any implication of any such understanding; requiring, as they appear to have done, an express stipulation by the applicant for insurance, that the policy should not have force until the premium was actually received. And we are not apprised by any evidence in this record that Tenwinkle & McCune, who were the employers of Gray, were content or inclined to rely upon his responsibility at all. They certainly relied upon his integrity, to account faithfully for all moneys collected for them; but this they might well do without being disposed to trust either to his judgment or his responsibility, under an unlimited arrangement that he might deal as a principal, in respect to the premium moneys. It is very true that if he saw fit to pay over to his principals the premium upon a policy, they did not inquire whether he had actually received it or not; nor had they any occasion to. If a collecting agent, for any reason of his own, pays to his principals the amount of a demand which he has not collected, it would be a violent inference from that fact that he was authorized to discharge other demands without payment. The implication, on

the other hand, would be that the principal insisted upon strict payment always, and did not consent in any case to leave matters open to await the result of private arrangements between the debtor and the agent, with which the principal was not concerned, and which he did not care to inquire into.

There is still less ground for assuming that there is any evidence in the case from which an implication can arise of a valid agreement to give Willets credit for the balance of the premium. There is no evidence whatever that Gray had authority to give credit, and if he had, the payment of a part of the premium could not, by itself, raise a presumption of an understanding that time should be given for the payment of the balance. The company, on the other hand, would have had a right to insist that the remainder should be paid immediately.

For this error, we think the judgment should be reversed. On the admission of evidence, we are inclined to think no error was committed, except in the refusal to admit the evidence of Gray as to his conversation with Tenwinkle in the presence of Johnson. That, we think, would have been admissible; and had evidence been given by him in accordance with the proposition of counsel, while it would not have contradicted Johnson directly, it would have gone very far in convincing a jury, if they believed it, that the conversation testified to by Johnson did not take place.

The other justices concurred.

MINNESOTA.

THERESIA HEIMAN *vs.* THE PHOENIX MUTUAL LIFE INSURANCE CO.

(17 Minn. 153. Supreme Court, 1871.)

Consummation of contract. Delivery of policy.—It appeared in this case that an application for insurance had been duly made, a policy based thereon signed and sealed by the company and sent to an agent at the place of residence of the applicant, and that the policy had been offered to his son (the applicant being away) upon payment of a certain sum and signing a certain note for the premium. The note was given, but the agent declined to deliver the policy; saying that he would keep it till the return of the father, and would wait for the money and keep the policy good in the mean time. *Held*, that the contract of insurance was not consummated.

APPEAL by the plaintiff from an order of the court of common pleas for Ramsey County, denying a new trial. The case is fully stated in the opinion.

Lorenzo Allis, for appellant.

Bigelow & Clark, for respondent.

By the Court, BERRY, J. By the pleadings and otherwise it is admitted in this case that the defendant is a life insurance company, duly incorporated under the laws of Connecticut, and authorized to transact business in this State; that on or about July 15th, 1869, at St. Paul, an application was made to defendant through its duly authorized agent, by Hirsch Heiman, for an insurance upon his life for the benefit of the plaintiff, his wife; that defendant made out a policy of insurance upon such application, and transmitted the same to its agent in Minnesota, by whom it was received on or about the 3d day of August, 1869.

Plaintiff introduced testimony tending to show that about August 10th Hirsch Heiman went out of the State (of which he was resident) upon a temporary absence, leaving his minor son, Isidor Heiman, in charge of the business which he (the said Hirsch) followed, to wit, that of a clothier; that on or about August 25th, and about fifteen days after the said Hirsch had departed from this State as aforesaid, one Thompson, who had received the policy from Van Duzen, (defendant's general agent in Minnesota,) came to the store in which Isidor was conducting

his father's said business, and informed said Isidor that he had the policy before mentioned, at the same time exhibiting it to said Isidor, (who read it,) and informing him that the first annual premium, about \$100, was to be paid in cash and a note to be executed for about the same sum ; that Isidor told Thompson that he could not pay him any money, but would sign the note ; that at said Thompson's request he signed the note for and in the name of his father ; that Thompson took the note, and put it with the policy in an envelope ; that said Isidor then asked said Thompson for the policy, but that Thompson said he would keep it till said Hirsch Heiman got home, and would wait for the money, and keep the policy good until then ; that said Thompson did not deliver the policy to said Isidor ; that said Isidor informed said Thompson that he expected his father home in a few days ; that the note has never been returned.

It was admitted that the note signed by said Isidor as aforesaid was of the tenor following, with the blanks filled up : "Hartford Twelve months after date, for value received, I promise to pay the Phoenix Mutual Life Insurance Company or order Dollars, with interest payable annually in advance at 6 per cent., it being for part premium due and payable on policy No. of said company on the life of , dated , which policy, and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of the note."

Said Isidor, witness for plaintiff, testified on cross-examination as follows : "Mr. Thompson asked me for the money. He said there was so much to be paid. He asked if I could pay it. I said I was pretty short, but that my father would be home soon. He did not urge me to pay it, . . . did not tell me that it was necessary to pay the premium."

Josiah Thompson, a witness called by plaintiff, testified that he received the policy from Van Duzen, (the defendant's general agent in the State,) "to deliver and collect the premium on it the same as on other policies ; that he had no special instructions in this case ; that his instructions in every case were, that the policy was not to be delivered till he received the premium."

It further appears that said Hirsch Heiman never returned home after his aforesaid departure from the State ; that he died on the 9th day of September, 1869, and it was admitted that

Heiman v. The Phoenix Mutual Life Insurance Company.

proper proofs of his death had been duly served upon defendant. The plaintiff, having introduced some other evidence not important in considering the questions presented upon the appeal, rested her case. Thereupon defendant moved to dismiss upon the ground that plaintiff had "failed to establish a cause of action." The motion having been granted, plaintiff made a motion for a new trial, and from the order denying the latter motion she appeals to this court.

Plaintiff argues that the dismissal was erroneous, first, because, even admitting that the policy was never delivered, there was evidence in the case tending to prove a *contract of insurance*, upon which evidence the jury should have been allowed to pass.

This position has reference to the evidence that an application for insurance had been duly made, and a policy based thereupon had been signed and sealed by the defendant and forwarded to an agent, whose duty it was to receive the premium and deliver the policy to the insured.

Plaintiff contends that, upon this evidence, it was for the jury to determine whether the application had been accepted by the defendant, arguing that, if it had been accepted, the contract of insurance existed, although the policy, the formal instrument evidencing the contract, had not been delivered. But as, *independent of the policy*, there is nothing in the case tending to show any acceptance of the application or any agreement to insure, the *presumption* is that, while there were negotiations, there was "no contract, and no purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of premium." *Markey v. Mut. Ben. Ins. Co.* 103 Mass. 92.¹ See also *St. Louis Mut. Ins. Co. v. Kennedy*, 6 Bush, 450.²

The application for insurance is a *mere proposal* on the part of the applicant. When the insurer *signifies his acceptance* of it to the proposer, (and not before,) the minds of the parties meet, and the contract is made. *Tayloe v. Merch. F. Ins. Co.* 9 Howard, 390; *Flanders on Ins.* 109. This acceptance must be signified by some act; a simple mental acceptance — a mere thought — amounting to nothing.

Now the acts of the defendant, relied on by the plaintiff as showing an acceptance of her proposal, are the making of the

¹ *Ante*, vol. 2, p. 57.

² *Ante*, vol. 1, p. 753.

policy, and the forwarding of the same to an agent, whose duty it was to receive the premium and deliver the policy to the insured ; to which may, in this case, be added the presentation of the policy to plaintiff's alleged agent.

But while these acts were indicative of an acceptance of plaintiff's application, they were, under the presumption above mentioned, evidence of an acceptance only as the basis of a contract to be entered into by a policy, which was to be made and delivered, so as to become operative as a contract only upon the simultaneous payment of the premium. In other words, these acts on defendant's part were evidence, not of a contract to insure but of a willingness to enter into such contract upon performance (*i. e.* upon payment of the premium) by the other party.

It may further be added, in reply to a portion of the counsel's reasoning, that the application being a *mere proposal* "cannot be converted into a *contract* by delay on the part of the company," or its agent, in rejecting or accepting it. *Flanders on Ins.* 109 ; *Ins. Co. v. Johnson*, 11 Harris, 72.

So far then as the first position taken by plaintiff's counsel is concerned, the dismissal of the action was not erroneous.

In the second place the plaintiff insists that the dismissal was wrong, because there was evidence in the case tending to prove a *delivery of the policy*.

It is not claimed that the exhibition of the policy to Isidor Heiman, or his temporary possession of the same while reading it, amounts to a delivery. The policy was evidently handed to him for inspection simply, and not with the design of vesting its legal possession in him, or in any person through him. *Markey v. Mut. Ben. Ins. Co.*, *supra*, 614. A delivery may "either be actual, that is by doing something and saying nothing ; or verbal, that is by saying something and doing nothing ; or it may be by both. But it must be by something answering to one or the other or both these, and with an intent thereby to give effect to the deed." 2 Washb. Real Prop. 578, and cases cited ; *Stevens v. Hatch*, 6 Minn. 74 ; *Mills v. Gore*, 20 Pick. 35.

In the case at bar there is no evidence tending to show any transfer of the legal manual possession of the policy to the assured, or to any person for her, so as to constitute a delivery in fact. This being so, the policy is *prima facie* incomplete as a contract ; *Collins v. Ins. Co.*, quoted in *Flanders on Ins.* 104,

note ; and the burden is upon the plaintiff to show that the real intention and understanding was, to pass the legal title and possession without or before payment of the premium ; *Markey v. Mut. Ben. Ins. Co.*, *supra* ; and without delivery in fact ; and to account for the circumstance that the policy had not been put into her possession, as contracts of the kind usually are when completely executed ; or, in other words, to show that, though retained by Thompson, the policy was *constructively* delivered, or, in the language of the plaintiff's counsel, that Thompson's possession was the possession of the assured. To show this, plaintiff must prove that there was something said or done, or both, with the intent thereby to give effect to the policy.

Plaintiff relies upon the testimony of Isidor Heiman as follows : " I said I could not give him (Thompson) any money, as we were short, but I would sign the note, and I signed it for my father at Mr. Thompson's request. He took the note and put it with the policy in an envelope. I then asked him for the policy, but he said he would keep it till my father got home ; he said he would wait for the money until my father got home, and would keep the policy good until then."

In considering this testimony it is material to bear in mind that there was no manual delivery of the policy. This makes the refusal to deliver upon express request quite significant.

The refusal goes to show not only that Thompson did not intend to give effect to the policy, but that he meant to have his intention clearly understood ; but viewed in connection with Thompson's positive refusal to deliver, we think that a more particular analysis of the language above quoted places the fact that there was no intent to give effect to the policy beyond doubt. " He said he would keep it (the policy) till my father got home." Certainly there is nothing in these words indicating the intent referred to. " He said he would wait for the money until my father got home." This is not saying, that he will give credit for the cash part of the premium, and meantime hold the policy as a deposit, and as the property of the assured ; but the policy is retained for the payment of the premium. See *Hoyt v. Mut. Ben. Life Ins. Co.* 98 Mass. 544.¹ Thompson saying in effect, "*I will not deliver the policy, so as to make it operative*

¹ *Ante*, vol. 1, p. 253.

as a contract, because the money is not paid ; but I will retain the policy, and wait until Hirsch Heiman returns, to give him an opportunity to pay the money and receive a delivery of the policy."

The case is not analogous to those in which policies have been in *fact delivered* (though in violation of their own terms or of authority) before premium paid, pre-payment having been waived or a credit given for the premium. Policies issued under such circumstances have been upheld because *actually delivered*, and with intent that they shall take effect. *Sheldon v. Conn. Mut. Life Ins. Co.* 25 Conn. 207.¹ *Goit v. National Protection Ins. Co.* 25 Barb. 190 ; *Sheldon v. Atlantic Ins. Co.* 26 N. Y. 460. There is no credit given in the case at bar, not only because none is expressed, but because, there being no delivery of the policy but a refusal to deliver it, there was no consideration moving from the defendant for any obligation on the part of the assured for which to give credit ; and for the further reason that there was no consideration moving from the assured for any agreement on the part of the defendant to give credit. *Hoyt v. Mut. Ben. Life Ins. Co.*, *supra*. " And would keep the policy good until then." Now keeping in mind that when this was said there had been no actual delivery of the policy, but a refusal to deliver it, and that there had been no agreement to hold it as the property of the assured, it seems to us that these words can only mean, that he would keep the policy as good as it then was. He does not agree to *make* it good, to make it operative as a contract, to give effect to it as a policy, but simply to *keep it good*. As is suggested by the counsel for defendant, we think this means nothing more than that he would retain the policy, that is to say, would not return it to the home office, (as is usually required,) but would keep it good, so that when Hirsch Heiman returned he might have the same opportunity to pay the premium and take a delivery of the policy that he would have had if then present.

It is to be observed also that Thompson said he would keep the policy, wait for the money, and keep the policy good, all *until Hirsch Heiman got home*. All of these alleged promises are based then upon the idea that Heiman would get home. The words italicized are then, as it seems to us, in the nature of a condition,

¹ *Ante*, vol. 1, p. 27.

Heiman v. The Phoenix Mutual Life Insurance Company.

upon the fulfilment of which whatever binding force these promises may possess depends.

It is as if Thompson had promised to do these things until Heiman came home, if, or provided, he came home. When the fulfilment became impossible, as it did by Heiman's death, the promises, if ever binding, bound no longer.

As to the note, when it is considered with reference to the circumstances under which the testimony shows it to have been taken, it has no tendency to show a delivery of the policy, actual or constructive, or any intent to give effect to the same as a contract. Admitting that Isidor Heiman had authority to make the note, it could at most only go in part payment of the premium, and unless it was so agreed, (and there is no evidence of such agreement,) the assured would not, upon simply executing and delivering the note, be entitled to a manual delivery of the policy, or to claim that Thompson's possession of it should be held to be her possession; for, notwithstanding the execution of the note, the condition upon which defendant's liability upon the policy is to attach is *in part* unperformed. *Flanders on Ins.* 110; *Sandford v. The Trust F. Ins. Co.* 11 Paige, 547.

Nor is the retention of the note by the defendant or its agent important. Admitting that it is negotiable paper, and that it does not carry notice of its infirmity upon its face, there is nothing in this case to show that defendant has negotiated it, or claims to hold it adversely, or is not ready to deliver it up on proper demand. Certainly it is not defendant's duty to seek out the proper person to whom to tender it or give it up. See *Parker v. Parker*, 1 Gray 409, and *St. Louis Mut. Life Ins. Co. v. Kennedy*, *supra*.

Passing from these details, when we consider generally that all that was said and done at the interview between Thompson and Isidor Heiman was said and done in immediate connection with Thompson's positive refusal to deliver the policy, we think there is no reasonable construction of his language or acts which will justify the inference, that though he refused to give effect to the policy by manual delivery, he intended or was understood to intend, that he would hold the policy as the property of the assured, thereby making a constructive delivery of it, so that his possession would be assured's possession, and the policy be as good to her, to all intents and purposes, as if he had made manual de-

Schwartz v. The Germania Life Insurance Company.

livery thereof. And this inference is still more unwarrantable when we call to mind that, upon the testimony introduced by plaintiff, it appears that Thompson was instructed not to deliver policies until the premiums were paid, and that in the absence of clear, affirmative evidence to the contrary he is not to be presumed to have disobeyed his instructions and violated his obligation to his principal.

As in our opinion, then, the plaintiff failed to adduce evidence which by any fair construction tends to establish a contract of insurance or a delivery of the policy, actual or constructive, the order dismissing the action was right, and the order denying a new trial must be *affirmed*.

Ordered accordingly.

Note. — The doctrine of this case was reaffirmed in the following year, in an action by

MARY SCHWARTZ vs. THE GERMANIA LIFE INS. CO.

(18 Minn. 448. Supreme Court, 1872.)

Consummation of contract. Delivery of policy. — On September 1, 1870, plaintiff made a written application to defendant (through their agent in St. Paul, one Willius) for insurance upon the life of Freidolin Schwartz, her husband, and on the same day Willius forwarded the application to the home office in New York. September 9, Willius received a letter (dated September 5) from the home office acknowledging receipt of the application, and inclosing a policy (bearing date September 5) on the life aforesaid in the usual form of policies of endowment insurance. It provided for the payment of annual premiums of \$62.88 each, the first to be paid in hand, the rest respectively to be paid on or before the fifth day of September in every year during the continuance of the policy. Willius offered to deliver this policy to the husband Schwartz, upon payment of the premium. Schwartz declined to pay the same, and at his request the policy was, on October 13, returned to the home office with a request that it be changed for a policy providing for semi-annual instead of annual payments. October 25, Willius received a letter from the home office acknowledging the receipt of the returned policy and of his letter requesting the abovementioned change, and inclosing another policy like the first in all respects save that it provided for the payment of semi-annual premiums, \$32.07 in hand, and \$32.07 to be paid on or before the fifth day of March and September in every year during the continuance of the policy. October 13, Freidolin Schwartz was attacked with a dangerous illness of which he died October 29. October 25, after the arrival of the second policy, plaintiff went to the office of Willius, inquired for the policy and was informed that it had come. Upon asking if she could have it, she was told that she could not, because her "husband was taken sick." Thereupon, having requested that the premium money be taken, which was refused on the ground that "her husband was sick," she tendered the premium money, but defendant's agent refused to receive it for the sole reason that "her husband was sick." The second policy was never delivered nor offered to be delivered, and about November 1, was returned to defendant's home office, at defendant's request. There was testimony in the case not contradicted, and tending to show that defendant's general instructions to Willius were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of such delivery, but there was no evidence going to show that these instructions were known to plaintiff. *Held*, that no valid contract of insurance had been effected.

On or about the 1st of September, 1870, plaintiff made an application to Ferdinand Willius, agent of the defendant at St. Paul, for a policy of insurance upon the life of her husband, Freidolin Schwartz. The application was forwarded to the home office of defendant, at New York, and by due course of mail a policy was returned to Willius, the agent. The policy was dated

Schwartz v. The Germania Life Insurance Company.

September 5th, 1870, and payment of the premium was by the terms of the policy required annually. The agent sent the policy to the assured, who declined to receive it, and refused to pay the premium. By an arrangement between the assured and the agent, it was proposed that the terms of the policy should be changed so as to make the payment of the premium semi-annual instead of annual, and the company was advised of the arrangement, and returned a policy of the same date as the previous one, containing such change as to payment of the premium, which was received by the agent on the 25th of October, 1870. On or about the 13th of October, 1870, Freidolin Schwartz, the assured, was taken ill and died on the 29th of the same month. The last mentioned policy was never delivered to the assured, nor to the plaintiff, though she tendered the amount of the premium to the agent and demanded the policy on or about the date of its receipt by him, (October 25th, 1870.) Proofs of the death of the assured were duly made and served upon the company, with notice that the plaintiff claimed the amount of the policy, less the sum tendered for premium. This action was brought in the court of common pleas, Ramsey County, to recover such amount claimed, and was tried therein, resulting in a verdict for plaintiff. Defendant moved for a new trial, which was denied, and from the order denying the same an appeal was taken to this court. The exceptions taken upon the trial are sufficiently stated in the opinion.

Lampreys, for appellant.

Henry J. Horn, for respondent.

By the Court, BERRY, J. The principal controversy in this case relates to the law applicable to certain facts with regard to which there is very little difference between the parties.

The defendant is a life insurance company, having its home office in the city of New York, and a local agency in St. Paul, in charge of one Ferdinand Willius. On the first day of September, 1870, the plaintiff made a written application to defendant (through said Willius) for insurance upon the life of Freidolin Schwartz, her husband. The application, among other things, contained statements that "the present state of health" of the party whose life was to be assured was good; that he was not afflicted with any bodily defect; that the state of his health had been good theretofore, and that he had never been afflicted with any serious illness, defect, or personal injury. It also contained the following question and answer, viz: "Are you aware that this contract of assurance becomes valid only by the payment of the first premium?" Ans. "Yes." The application closed as follows, viz: "It is hereby declared that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, or suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render the policy null and void, and forfeit all payments made thereon; also, that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated herein shall be received by said company, or some authorized agent thereof, during the lifetime of the party therein insured."

Schwartz v. The Germania Life Insurance Company.

On said first day of September, said Willius, by mail, transmitted to defendant's home office the application inclosed in a letter of that date, the text of which is as follows: "Inclosed please find application of F. Schwartz, \$1,000." On September 9th, Willius received from the home office a letter signed by defendant's president, dated September 5th, acknowledging the receipt of the application and letter from Willius, and inclosing a policy on the life of Freidolin Schwartz, bearing date on said fifth September. This policy is, in general, in the usual form of policies of endowment assurance. It provides for the payment of *annual* premiums of \$62.88 each, the first to be paid *in hand*, the rest, respectively, to be paid on or before the fifth day of September in every year during the continuance of the policy. The policy provides further, that it is accepted upon the express condition that it shall be of no effect: "1st. If the declaration," evidently referring to the application made by or for the assured, "forming part of the contract and upon the faith of which this contract is made, shall be found in any respect untrue." "5th. If the above premiums, or any of them shall not be paid on or before the several days hereinbefore mentioned for the payment thereof respectively, or within three days thereof respectively." Willius offered to deliver this policy to Schwartz upon payment of the premium. Schwartz declined to pay the same in cash, claiming that one Rosenfield, a solicitor in the employ of Willius, had agreed to take the premium in whole or in part in board, which, however, such solicitor had no authority to do. The policy was not delivered, but at the request of Schwartz was returned on October 13th to the home office, with the request that it be changed for another policy providing for semi-annual instead of annual payments. On October 25th, Willius received a letter from the home office acknowledging receipt of the returned policy and of his letter requesting the abovementioned change to be made, and inclosing another policy like the first in all respects, save that it provided for the payment of semi-annual premiums, \$32.07 *in hand*, and \$32.07 "to be paid on or before the fifth day of March and September in every year during the continuance of the policy." At the foot of each policy was a note as follows, viz.: "Agents holding an appointment from the company are authorized to receive premiums at or before the time when due, upon the receipt of the president or secretary of the company, but not to make, alter, or discharge contracts, or waive forfeitures."

On October 13th, Freidolin Schwartz was attacked with a dangerous illness of which he died on October 29th. On October 25th, after the arrival of the second policy, plaintiff went to the office of Willius, inquired for the policy, and was informed that it had come. Upon asking if she could have it, she was told that she could not because her "husband was taken sick." Thereupon, having requested that the premium money be taken, which was refused on the ground that her "husband was sick," she tendered the premium money, but defendant's agent refused to receive it for the sole reason that her "husband was sick." The second policy was never delivered nor offered to be delivered to plaintiff or her husband, and about the first of November was returned to defendant's home office, at defendant's request. On the 18th of March, 1871, proofs of the death of Freidolin Schwartz, and of plaintiff's claim under the policy, were transmitted by Willius to the home office. There was testimony in the case not contradicted and tending to show that defendant's general in-

Schwartz v. The Germania Life Insurance Company.

structions to Willius were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of such delivery. There is no evidence going to show that these instructions were known to the plaintiff.

Plaintiff's counsel takes the position that these facts make out an *acceptance* by defendant of a *proposition* by plaintiff, the effect being to conclude "a contract of insurance between the parties according to the terms proposed." What is said in *Heiman v. The Phoenix M. L. Ins. Co.* 17 Minn. 153,¹ would seem to be in point here: "The application for insurance is a mere *proposal* on the part of the applicant. When the insurer *signifies his acceptance* of it to the proposer, (and not before,) the minds of the parties meet and the contract is made. This acceptance must be signified by some act." Plaintiff's application is properly characterized as a *proposition* to defendant. And when Willius (defendant's agent) offered the first policy to Schwartz, (who appears to be regarded by common consent as acting for the plaintiff as well as for himself in the whole business,) upon payment of the first premium, defendant thereby signified its acceptance of plaintiff's proposition. In other words, defendant thereby offered to insure the life of Freidolin Schwartz by delivering to plaintiff its policy of insurance upon pre-payment of the first premium in hand. But this payment was refused. This was a refusal by plaintiff to comply with the terms of her own *proposition*. It was a repudiation of the *proposition*—a rejection of the proffered *acceptance*, and, in effect and fact, a *refusal* to receive the policy at all.

Plaintiff having thus repudiated her own proposition, and refused to comply with the conditions upon which the defendant signified its acceptance of her proposition, as the basis of a contract of insurance, into which defendant offered to enter by delivering its policy, defendant, so far as any obligation or liability to plaintiff was concerned, stood precisely where it would have stood if it had never accepted plaintiff's proposition, conditionally or otherwise. Under these circumstances defendant certainly had the right to insist that it was not *bound* to the plaintiff by any contract of insurance, or by any agreement to enter into a contract of insurance. After plaintiff had thus refused to receive the first policy, it was at *plaintiff's instance* returned to defendant's home office. We are unable to conceive why, under these circumstances, it was not utterly inoperative as a foundation for any rights whatever upon plaintiff's part, whether such rights are sought to be placed upon the ground that defendant had insured, or upon the ground that it had agreed to insure the life of her husband. If we are right, it follows that, if there was any contract concluded between the parties to this action, this result must have been affected by the second policy, and by what took place in reference thereto.

The facts already detailed show that plaintiff's request that the policy should provide for semi-annual, instead of annual, premiums was acceded to, and that accordingly a second policy providing for such semi-annual premiums was transmitted from defendant's home office to defendant's agent (Willius) at St. Paul. Plaintiff's counsel claims that this second policy was not a new

¹ *Ante*, p. 612.

Schwartz v. The Germania Life Insurance Company.

contract; that the original contract was not superseded or rescinded by it, "but only modified in relation to the manner of payment;" that it "was really an affirmation of the original contract; that it was intended to be but a re-draft of the first as modified by mutual consent." However ingenious these suggestions may be, it is evident that they possess little or no force if the views we have already expressed in regard to the first policy, and its utter inoperativeness as a contract of any kind, or as evidencing a contract of any kind, are sound. As we have no doubt of their soundness, we are forced to the opinion before expressed, that if there was any contract concluded between the parties, this result must have been brought about by the second policy, and the facts which transpired in reference to it. The second policy was never delivered nor offered to be delivered to plaintiff, or to any one for her. Yet *independent* of this policy, there is nothing in the case tending to show any binding acceptance of plaintiff's proposition, or any agreement to insure, or contract of insurance. If, then, defendant in any way signified its acceptance of plaintiff's proposition, so that a contract was concluded between the parties, it must have done it by transmitting the second policy to Willius, its agent, for the purpose of having the same delivered to plaintiff upon payment of the first premium in hand. And if Willius *had no* authority, discretion, or duty in the premises, save only to deliver the policy upon payment of the first premium, then we can see no good reason why the transmission of the policy to him might not well be regarded as a signifying by defendant of its acceptance of plaintiff's proposition; nor any good reason why payment or tender of the first premium to such agent (even if delivery of the policy was withheld) would not have been completely effectual to entitle the plaintiff to the full benefits of the policy to the same extent as if it had been manually and unconditionally delivered. There is, however, nothing whatever in this case showing or tending to show that the defendant was under any legal obligation to accept plaintiff's proposition, or to enter into any contract of insurance thereupon, by issuing or delivering a policy, or otherwise. Plaintiff's application was a *mere proposal*, which defendant was at liberty to accept or decline at its own option. And as defendant was thus at liberty to accept or decline plaintiff's proposition at its own option, it is clear that upon the facts appearing in this case defendant was at liberty to accept upon such terms, and subject to such conditions, as it saw fit to impose. It was therefore competent for defendant to say to plaintiff: We will accept your application and deliver to you our policy upon payment of the first premium, provided your husband is *now* in good health; and it would be equally competent for defendant to transmit its policy to its local agent with instructions, general or special, to deliver the same to the plaintiff upon payment of the first premium, provided her husband was in good health at the time of such delivery. And in such case the transmission of the policy to the agent would go no further than to signify the defendant's acceptance of plaintiff's proposition *on condition* that her husband was in good health. The agent's refusal to deliver the policy, because of the fact that the husband was not in good health, would not be an attempt on his part to *alter* the contract, or impose terms other than those which had been agreed upon, as plaintiff's counsel contends. No *contract* could be made, nor any terms agreed upon, without

Schwartz v. The Germania Life Insurance Company.

some *action* upon the part of defendant. There being no *action* upon defendant's part except the transmission of the policy to its own agent, to be delivered (upon payment of the premium) *upon the condition abovementioned*, there would be no contract made, nor any *terms* agreed upon, save such as embraced such condition.

Nor is this a case in which, where an agent performs an act within the apparent scope of his authority, the act binds his principal, notwithstanding it was done in violation of private or secret instructions. The case at bar is not one in which the agent has *performed* any act in the name of his principal, under an apparent authority to perform the same, so that the party with whom he has contracted has acquired rights which the principal will not be permitted to gainsay. But if the instructions under which Willius refused to deliver the policy were in fact given, the case is one in which the agent has *refused* to perform an act which would bind his principal, and by virtue of which, if performed, the plaintiff would acquire certain rights against such principal, and has refused to do this because instructed by his principal so to do. Now, if the plaintiff had acquired any right to the policy, or to a contract of insurance except such as was subject to the condition of her husband's good health, (as we have endeavored to show that she had not, if the instructions referred to were in fact given,) then she might well contend that she was not to be deprived of that right by any private instructions given by defendant to its agent. Not having acquired any such right, (that is to say, if the instructions referred to were in fact given,) she is not in a position to insist that the policy shall be delivered to her in disregard of such instructions, or that she shall have the same rights and benefits as if it had been delivered to her. As the general charge of the court to the jury was entirely at variance with the views above expressed, there must be a new trial. This disposes of what has seemed to us to be the principal and most difficult question presented by this appeal, but as there may be a new trial it is expedient that we should consider some of the other questions raised and discussed by counsel.

The question, whether the instructions, as to delivering policies provided the person whose life was to be insured was in good health, were given, being a question of fact, the plaintiff had the right to put in her testimony upon the basis that no such instructions were given. And in this view we perceive no reason why the two policies, (notwithstanding the signatures were cancelled,) together with the correspondence in reference thereto between defendant and its agent Willius, were not properly received in evidence as documentary history of the case, and of the transactions between the parties in reference to the subject of the action.

We think the court was justified in receiving the evidence of what was said by Gustav Willius at the time when plaintiff went to the banking office occupied by him, Gustav, and his brother Ferdinand, (defendant's agent,) since there was testimony tending to show that Ferdinand was present at the conversation, and also that Gustav was in the practice of assisting his brother in the insurance business, and of attending to the same in his brother's absence.

The 10th interrogatory addressed to Schwendler, (defendant's vice-president,) inquired for the *custom* of defendant as to delivering policies. The

answer, which appears to be responsive to the interrogatory, states, among other things, a custom of the defendant not to deliver, or send policies to agents for delivery, except upon the condition that the person whose life is to be insured is in good health. We think the interrogatory and answer were properly excluded. Unless this custom was shown to be known to the plaintiff, or to have been communicated to Willius, as instructions, it is impossible to see its materiality in this case.

In regard to the statements contained in the application (and mentioned in the early part of this opinion) as to the health, bodily defects, &c., &c., of Freidolin Schwartz, we are of opinion that they had reference to the state of facts existing or which had existed at the date of the application, not to any which might occur subsequently to such date. The points made by defendant in reference to the court's refusal to instruct the jury as requested upon the question of tender, do not appear to be particularly insisted upon. It is unnecessary to say more in regard to them than that we think the tender sufficiently pleaded in the complaint; that it was not necessary for plaintiff to bring the amount tendered into court, the case being one in which if she is entitled to recover at all, defendant may receive the premium money in the way of a deduction from the sum of her recovery, and that as the evidence tended to show an absolute refusal to receive the tender, the manner in which the testimony tended to show that it was made was, beyond doubt, sufficient.

We need not consider the propriety of the questions which were excluded by the court as not proper cross-examination. This objection to them can easily be obviated if a new trial should be had. Nor need we consider the point made as to the allowance of interest on the judgment. An amendment, allowable as a matter of course would prevent the recurrence of the question raised.

This in effect disposes, we think, of all the important matters presented by the case. Order refusing a new trial reversed, and

New trial granted.

DUNBAR PRICE & LIZZIE D. PRICE, by guardian *ad litem*, vs. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(17 Minn. 497. Supreme Court, 1871.)

Action. Guardian ad litem. — In the case of a life policy for the benefit of the wife of the insured, and in event of her death the amount to be payable to their children, or to their guardian if they are under age; *held*, the event having happened, that suit on the policy was properly brought in the name of a guardian *ad litem*.

Representations. Warranty. Burden of proof. — A life policy contained a provision to the effect that if any statement in the application, upon the faith of which the policy was issued, should be found in any respect untrue, the contract should be void. The application provided that it should form the basis of the contract, and that any untrue or fraudulent answers or any suppression of facts, should render the policy void. *Held*, that the statements in the application were representations and not warranties, and that

Price v. The Phoenix Mutual Life Insurance Company.

the burden of proving them untrue was therefore on the company. *Held*, also, that the terms of the policy had made these representations conclusively material.

Family physician.—The “family physician of the party” *held* to mean the physician who usually attends and is consulted by the members of a family in the capacity of physician.

APPEAL by defendant from an order of the district court for Hennepin County denying a motion for a new trial. The case is fully stated in the opinion.

Bigelow & Clark, for appellant.

Cornell & Bradley, for respondents.

By the Court, BERRY, J. This is an action upon a life insurance policy upon the life of Richard Price.

By the terms of the policy the defendant promises to pay the sum assured to Anna D. Price, (the wife of said Richard,) upon whose application and for whose benefit in the first instance the policy was issued.

The policy further provides as follows: “In case of the death of said Anna D. Price before the decease of the said Richard Price, the amount of the said insurance shall be payable to their children, for their use, or to their guardian if under age, within ninety days after due notice and proof of the death of said assured as aforesaid.”

Anna D. Price having died before her husband Richard Price, the said Lizzie D. and Dunbar Price, being their minor children, bring this action by said Elon Dunbar, duly appointed their guardian *ad litem* to prosecute the same. The defendant insists that the action should have been brought by the general guardian of said minors. But we are of a different opinion. Admitting that the guardian named in the policy is the general guardian, we think that while the words “payable . . . to their guardian . . . within ninety days,” &c., give the defendant the privilege and make it its duty to pay the sum assured to such guardian, (if the children are under age,) within ninety days, it does not follow that an action brought to recover the sum assured must be brought in the name of such general guardian. The children are the real parties in interest, and therefore the action is under the statute (ch. 66, Gen. St. §§ 26, 30) well brought by them in their own names, they *appearing* by a guardian *ad litem*. Even if the general guardian be regarded as a trustee of an express trust, the statute authorizing such trustees to bring actions in their own names is not imperative, but permissive in its terms. Ch. 66, Gen. St. § 28.

This action was brought in the Hennepin County district court, November 9th, 1869. The complaint, among other things, alleges that on the 10th day of June, 1867, Anna D. Price, who was then the wife of Richard Price, entered into a contract of insurance with the defendant upon her said husband's life. The complaint sets forth the policy in full. The consideration for the policy is expressed in it to be the representations made to defendant in the application for the policy, and the premium paid and to be paid. The policy contains the following provision: "*Provided, always*, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that . . . in case he shall die by the hand of justice, or in consequence of a duel, or of the violation of any law of these States or of the United States, or of any other country which he may be permitted under this policy to visit or reside in; or if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void." The complaint further alleges the death of said Anna, September 28th, 1867, and the death of said Richard, March 2d, 1869; and "that up to March 2d, 1869, all the terms, agreements, and stipulations of said policy of life insurance, that were to be performed on the part of said assured, had been fully and faithfully performed and complied with;" that proper notices and proofs have been duly made, but the defendant has failed to pay any part of the sum assured. The complaint does not set out the application referred to in the policy, nor state what the "declarations or statements" made in the application and referred to in the policy were.

Defendant's answer admits the making of a contract of insurance with Anna D. Price, and that the policy set out in the complaint contains a part of said contract, but denies that the policy contains the whole contract, and alleges that the application referred to in the policy is part of said contract of insurance.

The answer sets out the application, dated June 3d, 1867, which was made by the said Richard Price as agent for said Anna, and consists of certain questions addressed to said Richard, and his answers thereto. Said application contains a stipulation following the questions and answers, and in these words, namely:*

Price v. The Phoenix Mutual Life Insurance Company.

“ It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned, that this application shall form the basis of the contract for insurance, and that any untrue or fraudulent answers, any suppression of facts, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments made thereon.”

The answer denies that up to the 2d day of March, 1869, all the terms, agreements, and stipulations of the policy that were to be performed on the part of the assured, have been fully and faithfully performed and complied with, and charges that the answers to the following questions in the application were untrue, viz : —

“ 7. What is the present state of the party's health ? Answer. Good.

“ 9. Is the party addicted to the habitual use of spirituous liquors or opium ? Answer. No.

“ 13. Has the party ever had any of the following diseases, (naming them and among others,) gout, rheumatism ? Answer. Never.

“ 18. Has the party had, during the last seven years, any severe sickness or disease ? If so, state the particulars, and the name of the attending physician, or who was consulted and prescribed. Answer. No.

“ 25. Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted ? Answer. Have none.”

The answer further charges : that at the time of the making of the application, and the issuing of the policy, said Richard's health was not good, but that he was in bad health and diseased ; that he was addicted to the habitual use of spirituous liquors ; that before said times he had had gout and rheumatism ; that he had had within seven years before said times dyspepsia and chronic gastritis, and that at said times he had a family physician.

Upon the trial before the court and a jury, plaintiffs introduced evidence of the due appointment of the guardian *ad litem*, and of the making and delivering to defendant of the proof of death, with other notices and certificates required, and also proved by the witness Andrew Scott, who was boarding in Price's family

from September, 1865, to the summer of 1867, his (Richard Price's) health was good so far as the witness knew. They also proved by Dr. Murphy, one of the defendant's medical examiners, that he knew Richard Price in his lifetime for three or four years; that he made a particular examination of him at the time of his application, and considered him a healthy, sound man at the time, and passed him as a suitable subject for insurance; that he examined him and found no disorder about him. Plaintiffs also proved by Dr. C. G. Goodrich that Price died of typhoid fever; and after offering some other evidence, not here material, rested their case. Defendant thereupon moved to dismiss the action, upon the ground that the complaint does not state, nor the evidence establish, a cause of action.

It is here argued that the court below erred in refusing to grant the motion, because the statements contained in the application are warranted, and therefore conditions precedent to plaintiffs' right of recovery which it is necessary for them to aver and prove.

The plaintiffs claim, on the other hand, that these statements are representations. The point thus presented for our consideration is one of prime importance in this case, not only with reference to the question of pleading and burden of proof, but with reference to the further inquiry whether it is essential to plaintiffs' recovery that the statements mentioned shall be *strictly* true, or whether their substantial truth is sufficient.

So far as the questions presented by the case at bar are concerned, it is sufficient to define a *warranty* in insurance to be a part of the contract evidenced by the policy, and a binding agreement that the facts stated are strictly true. 1 Phillips on Insurance, 5th. ed. §§ 754, 756; Flanders on Insurance, 204-5.

A *representation* in insurance may, for the purposes of this case, be defined to be a statement in regard to a *material* fact made by the applicant for insurance, to the insurer, with reference to a proposed contract of insurance. 1 Phillips on Insurance, § 524 *et seq.*

As representations simply, they are not a part of the contract of insurance. Flanders on Insurance, 201, and cases cited; *Campbell v. N. E. M. L. I. Co.* 98 Mass. 381.¹ And though expressly referred to in the policy so as to become a part of the

¹ *Ante*, vol. 1, p. 229.

Price v. The Phoenix Mutual Life Insurance Company.

written contract, they may not become warranties. 1 Phillips on Insurance, §§ 871, 893. And even if it be made by the very terms of the policy, as in the case at bar, an express condition of the contract of insurance that if such representations are found to be untrue, the policy shall be null and void, they do not necessarily lose their character as representations, and become warranties, though the effect of such express condition may be to make them conclusively material. *Campbell v. N. E. M. L. Ins. Co., supra.*

It is sufficient if representations be *substantially* true, while a warranty must be *strictly* complied with. 1 Phillips on Ins. §§ 544, 669, 762 *et seq.*; *Daniels v. Hudson R. F. I. Co.* 12 Cush. 423; *Chaffee v. Cattaraugus Co. M. F. I. Co.* 18 N. Y. 376. A false warranty, therefore, avoids a policy, while a false representation (not fraudulent) does not avoid a policy unless it relates to something which is material in fact, or is made material by the contract of the parties. 1 Phillips on Ins. § 524 *et seq.*; *Flanders on Ins.* 202, 298, 326; *Witherell v. Maine Ins. Co.* 49 Me. 200; *Campbell v. N. E. M. L. Ins. Co., supra.*

Warranties are, then, conditions precedent, so that their truth must be pleaded by the assured, upon whom of course the burden of proving the same rests; whereas the falsity of representations is matter of defence to be pleaded and proved by the insurer. *Wilson v. Hampden Ins. Co.* 4 R. I. 159; *Campbell v. N. E. M. L. Ins. Co., supra*; *McLoon v. Com. Mut. Ins.* 100 Mass. 474; *Herron v. Peoria M. & F. I. Co.* 28 Ill. 238; *Mut. Ben. Ins. Co. v. Robertson*, 54 Ill.;¹ *Leete v. The Gresham L. I. Co.* 7 Eng. Law & Equity, 578.²

We have brought together the foregoing principles of the law of insurance, not because they all have a direct application to this case, but rather with the view of bringing to mind and placing side by side the respective consequences which flow from treating statements of the kind under consideration as warranties, or as representations. And when it is considered that a *strict*, or, as many of the authorities hold, a *literal* compliance with the terms of a warranty is required, it is not difficult to appreciate the force of what is said by Chief Justice Shaw in *Daniels v. Hudson River F. I. Co.* 12 Cushing, 424: "The leaning of all

¹ Qu. ?

² S. C. 15 Jur. 1161.

courts is, to hold such a stipulation to be a representation, rather than a warranty, in all cases, where there is any room for construction ; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract." And see *Campbell v. N. E. M. L. I. Co.*, *supra*, and authorities cited. This intent and purpose is, as we understand it, to enter into a contract of insurance against the real substantial risk in the given case. And see *Flanders on Ins.* 224. Hence it is said, too, that "if it be doubtful whether certain statements made by the applicant relative to the subject of insurance are to be regarded as warranties, or as representations, they will be treated as the latter." *Wilson v. Conway F. I. Co.* 4 R. I. 143.

And we think it is well and truly remarked in 1_Phillips on Ins. § 638, in speaking of the difficulty of determining, in many cases, whether certain phraseology makes a warranty or a representation, that "The cases would have presented fewer difficulties of construction if the early jurisprudence had been less open to the admission of forfeitures of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, where such a construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may as well be applied to stipulations and recitals in the policy, as to representations preliminary and collateral to it ; and it is more equitable, after the policy has once gone into effect, and the underwriter has a right to retain the premium, that the contract should be continued in force as long as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced." These remarks apply, as it seems to us, with peculiar force in this State, where equity, which abhors forfeitures, is blended with law in the administration of justice.

We come now to the application of what has been said to the purpose of determining whether the statements referred to in the policy in this instance are to be regarded as warranties or representations ; and upon this branch of the case we cannot do better, even at the risk of some repetition, than to quote what is said in the comparatively recent case of *Campbell v. New England Mutual Life Insurance Company*, 98 Mass. 381.

It is there said: "When statements or engagements on the part of the insured are inserted or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of the expression used, the apparent purpose of the insertion, and sometimes upon the connection, or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations of course will apply. But if the reference appears to be for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements it contains will not thereby be changed from representations into warranties. . . . In considering the question whether a statement forming a part of the contract is a warranty, it must be borne in mind as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties. (Authorities cited.) When, therefore, from the designation of such statements as 'statements' or 'representations,' or for the form in which they are expressed, there appears to be no intention to give them the force and effect of warranties, they will not be so construed. (Authorities cited.)

"The application is in itself, collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of representations. They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose, manifested in the papers thus connected, that the whole shall form one entire contract."

These remarks are made in a case in which the policy was by its express terms made payable "upon the following conditions," (among others,) that "if the statements made by or on behalf of or with the knowledge of the said assured to said company as the basis of or in the negotiations for this contract shall be found in any respect untrue, "then the policy should be null and void."

In the application in the case cited the applicant "proposes to insure" his life with the defendant, "and with that view, and as the basis of such insurance," makes the statements contained

therein. It also appeared that in answer to the questions, "Have you carefully read the above questions and the answers thereto?" and, "Are you aware that any fraudulent or untrue answers, or any concealment of fact, or non-compliance with the terms and conditions of the policy, will vitiate this insurance?" the applicant answered, "Yes."

The application concluded as follows: "The foregoing are full, fair, and true answers to the questions proposed," and was signed by the applicant. The principal defence was that certain statements contained in the application were untrue, and that by reason thereof the policy was null and void.

The court after attempting (not however as it seems to us with complete success) to distinguish the case under consideration from *Miles v. Connecticut Insurance Co.* 3 Gray, 580,¹ in substantial respects, proceeds as follows: "The defendant however contends that a written application having been made in this case, which by its own terms declares the statements therein contained to be made 'as the basis of' the insurance applied for, the policy will attach to that application as containing the 'statements' referred to, and thus constitute an express warranty. . . . But even if the application may properly be resorted to for aid in the construction, it contains no agreement and no words to indicate that its statements are to be taken as warranties; nor that they are to form part of the contract. The designation of 'statements,' both in the application and in the policy, comports with the idea of representations rather than of warranties. Representations are 'the basis of' the contract of insurance; and such these 'statements' are declared to be. The effect which is to result from their untruth results also from the untruth of representations. It is true that misrepresentations defeat a policy without any provision to that effect in the policy itself. But the insertion of such a provision does not therefore require a construction which shall give them a different force or character. . . . The clause in the policy is in the form of a condition, and is grouped with other provisions of various character and purpose under the general head of 'conditions.' But the use of the term 'conditions' does not always carry the legal consequences which attach to that word in its technical meaning. The clause must be taken as a part of the contract, and must have

¹ *Ante*, vol. 1, p. 173.

Price v. The Phoenix Mutual Life Insurance Company.

such an application as its fair interpretation, with the other parts of the contract, requires; but neither the form, nor the subject matter, nor its associate provisions under the head of 'conditions,' indicate that it was intended to give to this clause the technical character of a warranty, or a condition precedent. . . . By statements 'in any respect untrue' must be intended statements made and received as inducement to the contract; that is, material and proper to be disclosed to the insurers to enable them to estimate the risk proposed, and determine upon the propriety of entering into the contract."

It was held in the case cited, that the statements made in the application were not warranties, but representations only; that the burden of proving them to be untrue was upon the insurers; that they need not be complied with literally, but must be substantially; that where the question of the materiality of the representations depends upon circumstances, and not upon the construction of any writing, the question is one of fact to be determined by the jury; but that where the representations are in writing, their interpretation belongs to the court, "and the parties may by the frame and contents of the papers, either by putting representations as to the quality, history, or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and when they have done so, the applicant for insurance cannot afterwards be permitted to show that a fact which the parties have thus declared material to be truly stated to the insurers was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question."

The court after citing numerous authorities in support of these positions, and among others, *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, (Eng. Law & Eq. 1,) ¹ held that in the case before it, upon the facts before stated in reference to the language of the policy and application, and to the answers made to specific questions put in the application, the parties had by their contract made the representations (designated as statements in the policy) material to be disclosed; and that the only question for the jury upon this branch of the case was whether the representations were substantially untrue. The sum and substance of all this would seem

¹ *Ante*, vol. 2, p. 341.

to be, that the effect of the condition is to require that the statements shall be true as *material representations*, not as *warranties*; or, in other words, that they must be materially and substantially true, and need not be strictly or literally true. We barely suggest that perhaps the very fact that the word true, as applied to insurance, is thus ambiguous, would lead to the same conclusion when taken in connection with the familiar rule by which an instrument is construed most strongly against its maker, which in the case of the present policy is the defendant. See also *Miller v. Mut. Ben. L. I. Co.* Iowa Sup. Ct. 1871;¹ *Mut. Ben. L. I. Co. v. Wise*, Md. Court of Appeals, 1871.² We have drawn at length upon the case of *Campbell v. N. E. M. L. Ins. Co.*, because it seems to us to square in all material particulars with the case at bar, so far as the questions now being considered are concerned.

In the policy and application in the case at bar, it is nowhere said, in terms, that the application does or shall form part of the policy, though this fact does not seem to us to possess an importance so decisive as is attributed to it in some of the adjudged cases.

The application in this case is headed: "Questions to be answered by the person whose life is proposed to be insured, and which *form the basis* of the contract." The concluding question and answer in the application are these: "Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon? Fully." The application then proceeds as follows: "It is hereby declared, that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned, that this application shall *form the basis* of the contract for insurance, and that any untrue or fraudulent answers, and suppression of facts, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void, and forfeit all payments thereon."

The application is signed as before stated, and contains no further or other statements important to be here referred to.

¹ *Ante*, vol. 2, p. 693.

² *Ante*, p. 581.

The policy purports by its terms to be made by the company, in consideration of the *representations* made to them in the application for this policy," and of the premiums paid and to be paid.

The proviso contained therein is as follows: "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that . . . if any of the *declarations* or *statements* made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, the policy shall be null and void;" and the policy contains nothing further of importance here.

Now upon comparing the application and policy in this case (portions of the above extracts from which we have italicized for convenience) with the application and policy in *Campbell v. N. E. M. L. I. Co.*, we are unable to perceive that they differ in any respect material to the question under consideration. It seems to us so clear that a careful comparison of the language used in the two cases will lead to this result, that we deem it superfluous to attempt to establish it by argument. We will, therefore, content ourselves with calling attention to a single point of verbal difference. In the case cited the condition is, that "if the statement made . . . as the basis of or in the negotiations for this contract shall be found in any respect untrue," &c. In the case at bar the condition is, "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue," &c. With the here unimportant difference, that in the first case the statements referred to are not confined to those made in the written application, it seems to us that the "conditions" are substantially identical. The words, "as the basis of . . . the contract," and the words, "upon the faith of which this policy is issued," taken in the connection in which the same are used, appear to convey the same idea.

If the statements were the *basis* of the contract, the policy was issued upon the faith of them, and *vice versa*. The words, "in the negotiation," &c., do not of course affect our present comparison. But independent of the authority of the case from which we have so largely quoted, we may well pause to inquire why, if it was the intention to make the statements contained in

the policy warranties, that intention was not distinctly expressed? All doubt could have been removed by a few words, by far less words than are now used in the policy in reference to this matter. Why, then, were they not called *warranties*, rather than "representations," "declarations," "statements," unless the understanding was that they were the latter and not the former? Our conclusion, then, upon this branch of the case is, that the statements referred to in the policy are not warranties, but representations, and that, therefore, their untruth is matter of defence to be pleaded and proved by the defendant. It follows that defendant's motion to dismiss the action, because plaintiffs had failed to plead or prove a cause of action, was properly denied.

We are well aware that it would be difficult, if not impossible, to reconcile the views expressed in the case cited from 98 Mass., which we follow in the main, with the doctrines laid down in a great number of other cases.

We have examined all the authorities cited by defendant, and very many more. Some of them, as perhaps *Cazenove v. British Equitable Ins. Co.*,¹ together with *Anderson v. Fitzgerald*, *supra*, (which it follows,) would not, if their authority was confined to the facts presented, conflict with the case from 98 Mass.; while others are either quite irreconcilable with it, or, if they could be reconciled, it is only by what appear to us to be distinctions without difference.

We can conceive of no useful purpose which would be subserved by a detailed examination of the multitude of cases bearing upon this subject. Suffice it to say that the views to which we have arrived are the result of pains-taking examination, and are such as commend themselves to our best judgment. This disposes of the defendant's first assignment of error.

The motion to dismiss having been denied, the trial proceeded, and defendant having rested the case upon its part, plaintiffs introduced evidence in rebuttal. Defendant contends that the court below erred, secondly, in the admission of evidence under the following circumstances. The 13th question and answer in the application were: "Has the party ever had any of the following diseases, (naming several, and among others,) rheumatism? Answer. Never." Testimony having been introduced going to

¹ *Ante*, p. 202.

show that, prior to the application, the life insured had sub-acute rheumatism, one of plaintiffs' witnesses (a physician) was asked: "Has sub-acute rheumatism any effect to shorten life?" The question, with another of a similar character, was permitted to be answered, against defendant's objection. The only object of this evidence (so far as we can judge) must have been to show that sub-acute rheumatism did not shorten life, as a basis for inferring that it did not enhance the risk, and was, therefore, not material to be disclosed to the insurer. If sub-acute rheumatism was the disease of rheumatism within the meaning of the 13th question, the evidence was entirely inadmissible, since, as we have already seen, it had been conclusively settled by the contract of the parties that the answer to the 13th question was a material representation. *Geach v. Ingall*, 14 Mees. & Wels. 95.¹ It necessarily follows that the question of materiality was not open, or, in other words, that the plaintiffs could not be permitted to show that the representation was not material. If on the other hand sub-acute rheumatism was not the disease of rheumatism within the meaning of the question, (as to which neither the witnesses nor the counsel agree,) it might, perhaps, be claimed that the testimony as objected to was unimportant, and worked no harm to defendant. But if the case turned (as it may have done) upon the representations contained in the answer to the 13th question, it is impossible for us to say whether the jury found for the plaintiffs upon the ground that sub-acute rheumatism was not the disease of rheumatism within the intendment of the question, or upon the ground that if it was such disease they had the right to inquire whether the representation made in regard to it was material. We cannot say, then, that the evidence was not prejudicial to the defendant; its reception was therefore error.

This brings us to the points made by defendant in reference to the instructions requested and refused to be given, and the charge given to the jury. The court instructed the jury that "upon the issues made by the pleadings, upon the falsity of the statements and representations contained in the application in question, the burden of proof was upon the defendant, in respect to the affirmative matter set up by the defendant in its answer, to defeat a recovery in this action." For reasons before given, it is apparent that defendant has no cause to complain of this instruction.

¹ *Ante*, vol. 2, p. 306.

The court also instructed the jury "with reference to the issue made upon the 13th question, and the answer thereto in said application, that if said Price, prior to the making of said application, had any of the affections mentioned in said question, but of so trifling a character as hardly to be classed among diseases, and as not to be remembered at the time of the application, it might not be a substantive disease so as to have an influence upon the length of life of the party making the application, or such as would be noticed by the medical examiner as disease, and in that case the answer to said question might not be a misrepresentation under a fair and reasonable construction; that this was, however, a question for the jury to determine upon the evidence in connection with the medical testimony, and that the jury were the exclusive judges of the facts."

It must be confessed that this instruction is not altogether clear or satisfactory.

The representations contained in the answer to the 13th question were, as we have already seen, made conclusively material by the express contract of the parties.

If the life insured had not had the *diseases* mentioned in the question, then no affection which he might have had, no matter how near akin to, or how closely resembling or approximating the disease mentioned, would make his negative answer to the question a material representation.

But if he had had any affection amounting to a *disease* of the kind mentioned, his negative answer would be a material misrepresentation, no matter how "trifling" the character of the affection, nor whether it was remembered at the time of the application, nor whether it would have any influence on the length of his life, nor whether it would be noticed by the medical examiner; and if there was an affection amounting to such disease, the question of the materiality of the negative representation would not be open to the jury, as the instruction would appear to indicate. *Geach v. Ingall, supra.* We are, therefore, of opinion that defendant's exception to this instruction was well taken.

Among other requests, defendant asked the court to instruct the jury "that the plaintiffs are not entitled to recover in this action, but the verdict must be for the defendant."

The instruction was refused. Defendant also insists, as was insisted upon the motion for a new trial below, that the verdict

was not justified by the evidence. Defendant claims that the court below erred in refusing the instruction asked, and in denying the motion (based upon the ground just mentioned) for a new trial; and as both alleged errors are predicated upon substantially the same considerations, we will examine them together, — first premising, however, with regard to the refusal of the instruction, that it was in effect a request that the court should take the place of the jury, and render a verdict upon the questions of fact involved in the issues.

Now, of course, there are cases in which, there being no evidence to sustain the plaintiff's alleged cause of action, it is proper enough for the court to direct the jury in terms to find for the defendant. But it seems to us that it would hardly be error for the court to refuse to give such instruction when the request is made under circumstances like those presented in this instance. Both parties in this case appear to have introduced or offered all the testimony desired by either, and the testimony having been closed, the case has been rested on both sides. The record shows that without the interposition of a motion to dismiss, the court was "thereupon" requested by the defendant to give ten instructions, of which that under consideration was the first. Under these circumstances we think the court might well decline to pass upon the effect of the testimony at this stage of the proceedings.

The jury being the judges of the facts, according to the charge subsequently given, and the testimony being all before them, and the case having (as it is to be presumed) been argued to the jury, the court might, in the exercise of a sound discretion, very properly decline to consider at this time, and upon a sudden, the questions presented by the defendant's request, and to keep the jury and the other business of the court waiting meanwhile.

The jury were competent to pass upon these questions, and if the fact should be (as claimed in this case) that the verdict was not justified by the evidence, the defendant could easily take advantage of it (as it did) upon a motion for a new trial. Except, however, for the purpose of forestalling wrong influences, and with reference to a new trial, these remarks are not of any great practical importance in this case, since, as before suggested, the same questions upon the merits are presented by the refusal to give the instructions requested, and by the refusal to grant the new trial. The defendant insists that the court below erred

in both refusals, because the uncontradicted and unimpeached evidence showed that the answers to the 13th, 18th, and 25th questions in the application were untrue. The 13th question was: "Has the party ever had any of the following diseases, (naming several, and among others,) rheumatism?" "Answer. Never." There was evidence in this case tending to show that the life insured had had sub-acute rheumatism. There was also evidence in the case tending to show that sub-acute rheumatism is not the disease of rheumatism in the ordinary understanding of the term. There was also evidence tending to show that, technically, and in medical parlance, sub-acute rheumatism is the disease of rheumatism. Dr. Willey swears that it is generally overlooked as a disease, and there is other testimony to the same effect.

The rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, is not comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or the extracting of a tooth, is the *disease* of "spitting of blood" mentioned in the same question. The life insured had the right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question so that its language was capable of being construed in an ordinary, as well as in a technical sense, the defendant can take no advantage from such ambiguity. *Wilson v. Hampden Fire Ins. Co.* 4 R. I. 159; *Flanders on Insurance*, 225. As to this question, then, we cannot say that the verdict was not supported by the evidence.

The 18th question and answer were as follows: "Has the party had, during the last seven years, any severe sickness or disease? Answer. No." The charge in the answer was, that the life insured had had within seven years *chronic gastritis*. There was evidence tending to show that he had had gastritis. Unless chronic gastritis and gastritis are synonymous, as to which there is no judicial presumption nor testimony, the evidence was not within the issues, so that the false representation charged was not proved. In addition to this consideration, we are not free from doubt as to whether gastritis was shown to be "a severe sickness or disease." We can take no judicial cognizance of its character. The evidence certainly has a strong tendency to show

that it was the result of the excessive use of spirits, and that it was an affection of brief duration.

We cannot say that the jury might not upon the evidence find a warrant for regarding it as a temporary consequence of dissipation, rather than a "severe sickness or disease," in the ordinary meaning of those terms. As to this question, then, we are unable to say that the evidence did not justify the verdict.

It remains to consider the 25th question and answer, which are as follows, viz: "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted? Answer. Have none." This answer is, in our opinion, a positive denial that the life insured had a family physician.

The phrase "family physician" is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purpose of the testimony appearing in this case, the chief justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends, and is consulted by the members of a family in the capacity of physician.

We employ the word "usually," both because we do not deem it necessary to constitute a person a family physician, (as the phrase is used in this instance,) that he should *invariably* attend, and be consulted by the members of a family in the capacity of a physician, and because we do not deem it necessary that he should attend, and be consulted as such physician by each and all the members of a family. For instance, the testimony in this case shows that at the time when the application for insurance was made, the family of Richard Price consisted of himself, his wife, and two or three children. We think that a person who usually attended, and was consulted by the wife and children of Richard Price as a physician, would be the family physician of Richard Price in the meaning of the above 25th interrogatory, although he did not usually attend on, and was not usually consulted as a physician by Richard Price himself.

We had intended to go farther, and express an opinion distinctly and directly upon the question whether the verdict, so far as the matter of family physician is concerned, is justified by the evidence; but as the case will go back for a new trial on other grounds, and as we desire to avoid all unnecessary interference

with the action of a future jury, we shall rest content with having given our construction of the meaning of the expression "family physician," as used in the interrogatory under consideration; and with the further remark that, as we have already determined, the answer to the interrogatory is made conclusively material by the policy, so that if false, its falsehood will bar any recovery upon the part of the plaintiffs in this action.

As to the other branch of the 25th interrogatory, viz. that which asks for the name and residence of a physician whom the party has usually employed and consulted, we are all agreed that no proper issue is raised by the pleadings as to the truthfulness of the answer to the same, and we have, therefore, seen no occasion to inquire into its meaning, or whether, so far as it is concerned, the verdict is justified or not.

Order denying a new trial reversed, and a new trial awarded.

MCMILLAN, J. The 25th interrogatory and answer in the application upon which this policy is based, are as follows, to wit: "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted? Answer. Have none."

One ground of defence set up is that, at the time the application was made and the policy executed, Richard Price, the deceased, had a family physician. No other issue is taken upon this interrogatory. It does not appear that the term "family physician" has any technical signification; it is, therefore, for the court to determine the meaning of the phrase "family physician of the party" as here used. The purpose of the interrogatory was to obtain the name and residence of the medical attendant best able to give an account of the physical condition, at the time referred to, of the person whose life was assured. Bliss on Life Ins. 171. This intention would be best effected by obtaining a reference to the physician who was the medical adviser of such person. The interrogatory, it seems to me, was made to embrace the two questions contained in it, and put in the alternative, in order that a true affirmative answer to either would elicit the address of the physician who had charge of the assured, as his medical adviser. In both questions the inquiry is for the physician of *the party*; yet if the phrase "family physician of the party" does not necessarily include the person assured, a true answer in many cases may be given to the first

question embraced in the interrogatory without disclosing the name of the physician of the assured; for instance, the person whose life is assured may have one person as his individual physician, and a different person as the physician for all the rest of his family; yet if the construction given by my brethren to the phrase "family physician of the party" be correct, it seems to me he might, in answer to the inquiry for his family physician, truthfully give the name of the physician attending the other members of his family, and withhold the name of his personal physician, for according to this construction the terms of the question call for nothing more. It may be that such answer would not be a true answer to the entire interrogatory; but that is not the question before us; the only point for us to determine is whether Price's answer is false in this, that he had a family physician at the time, and answered that he had none.

I am unable, therefore, to concur with my brethren in the construction they give to the phrase "family physician of the party." I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician.

Upon all the other points considered in the opinion and in the conclusion arrived at in the case, I concur.

MISSISSIPPI.

W. C. STATHAM *et al.* vs. NEW YORK LIFE INSURANCE COMPANY *et al.*

(45 Miss. 581. Supreme Court, in Chancery, 1871.)

Agency. Effect of war. — Where, at the opening of the war, a life insurance company of New York had an agent in Mississippi, who remained during the war, the war did not, *per se*, revoke the agency, nor make it unlawful for the agent to receive premiums which were tendered. A payment to him would have been a discharge of the debt, and a tender to him of the annual premium due 8th December, 1861, saved the assured from being in default as to payment of premiums.

ERROR to the chancery court of Hinds County. Watts, J. The facts appear in the opinion of the court. The process, by which the funds of the company in this State were seized, was a writ of attachment and sequestration, issued from the chancery court.

W. & J. R. Yerger, for plaintiffs in error.

T. J. & F. A. R. Wharton, for appellees.

SIMRALL, J. This suit in chancery was brought by the complainants, the children and heirs of Mrs. Lucy B. Statham, deceased, who was the wife of Dr. Augustine D. Statham, deceased, against the New York Life Insurance Company, a corporation created by the State of New York, and Benj. G. Humphries, L. Mimms, and J. G. Milligan, defendants, to recover the amount of a policy of insurance on the life of Dr. A. D. Statham, issued in favor of, and to be paid to, his wife, Lucy B., in case she survived her husband; if she did not, then to her children. The bill alleges that Dr. Statham deceased on the day of , 1862; that all the annual premiums, from December 8th, 1851, until his death, were paid, except the note due December 8th, 1861, which was tendered to Brown, their resident agent, who declined to receive it; and moreover the pendency of the civil war excused the payment and prevented a forfeiture of the policy; that Humphries, Mimms, and Milligan have in their hands effects and moneys, belonging to the company, which will be remitted to them at New York, unless restrained by injunction.

The bill was dismissed on demurrer, and appeal to this court.

Statham v. New York Life Insurance Company.

The first question is as to the jurisdiction of the chancery court. The remedy (it is said) ought to have been at law on the policy of insurance, or by an attachment at law, to seize the effects and credits in the hands of Humphries, Mimms, and Milligan.

This is the renewal of a controversy which prevailed in the high court of errors and appeals for several years, whether the complainant (in such a case as this) must not show in his bill a distinct ground of equity, in addition to the fact that his debtor is absent from, or a non-resident of, the State, and that the home "defendant has effects belonging to, or a debt due to him;" that the "absconding" or non-resident debtor has lands or tenements in this State; which view of the subject ought to have prevailed, as an original proposition, was not considered by this court an open question in *Scruggs et al v. Blair*, decided October term, 1870; but [the court] readhered to what was laid down in *Trotter v. White*, 10 Sme. & Marsh. 612, and *Freeman v. Guion*, 11 Ib. 62; accepting as the doctrine which had been established, "that the basis of the jurisdiction is purely statutory, and depends on the condition of facts stated in the statute, to wit: "The absence of the debtor, the presence here of effects belonging to, or a debt due to him, or his owning lands and tenements in this State."

The allegations of the bill are within the terms of the statute; the New York Life Insurance Company, the debtor, is a non-resident corporation, created by and resident in the State of New York; B. G. Humphries, Mimms, and Milligan, resident defendants, are charged to have funds and effects of the debtor in their hands, which they will transmit to New York, unless restrained by injunction.

The question has been settled by the supreme court of the United States in many cases, that the late civil war brought along with it, as between the belligerents, the consequences and disabilities incident by international law to foreign war. Among these are a suspension of the right of suit upon all contracts made before the war, so long as it continued, and a prohibition of all intercourse, commerce, dealing and trading, between the inhabitants of the respective belligerent countries, except by license granted by competent authority.

Under authority of the act of Congress of July 13th 1861, the President of the United States, by proclamation of August of that year, declared certain of the Southern States, and parts of States,

including Mississippi, in a state of insurrection, and that all commerce between said State and the inhabitants thereof, and citizens of the other States, was, and would continue, unlawful, until such insurrection should cease, or be suppressed, and that all goods, chattels, wares and merchandise, coming from said State into other parts of the United States, (without special license of the President,) would be forfeited to the United States. The restrictions and prohibitions continued until May 22, 1865. See *Mrs. Alexander's Cotton case*, 2 Wall. 404; *The William Bagaley*, 5 Ib. 377; *Hanger v. Abbott*, 6 Wall. 532.

The excuse offered for non-payment of the premium note falling due December 8th, 1861, was, that the pending war made it impossible and illegal for the promisor to go to the city of New York and make the payment to the insurance company, domiciled there, and that it was also illegal and impracticable to make remittances. And second, that an offer of the money was made to the agent here, through whom the policy of insurance was effected, but that he declined to receive it, for the reason that the war had put an end to his agency, and moreover his accepting the money would be an illegal act. Between the date of the maturity of this premium note and December 8th, 1862, Dr. Statham deceased. The question made is, whether this default in the payment of the premium worked a forfeiture of the policy. The covenant is to the effect that if the annual premiums are not paid, but default is made when any one of them becomes due, then the policy ceases and is of no effect.

For the insurance company it is said, that the covenant is absolute, without condition or exception; and, therefore, the party cannot set up any excuse or exception which might have been introduced into the original contract; that if inevitable accident or other contingency is not stated in the contract as excuse or reason for non-performance, such defence cannot be set up, and reference is made to *Jemison v. McDaniel*, 25 Miss. 83, and *Harmon v. Fleming*, Ib. 142, where the general doctrine is so laid down. It is claimed therefore as a legitimate deduction from the principle, that inasmuch as the casualties of war might, for a time, interrupt the agency of the company in this State, and render a payment at the home office in New York impracticable and illegal, unless that condition of things is provided for in the policy, and stated as a reason for a postponement of the pay-

ment of the premium, and an exception which should not work a forfeiture, it is not provided against, and the party must take the consequences of such omission.

It is deduced by Mr. Duer, in his work on Insurance, p. 473, from the authorities, that a war between the countries of assurers and assured from the time that it occurs renders a prior marine insurance illegal and void, precisely for the reasons that render the contract illegal in its origin, when made during the war. *Gray v. Sims*, 3 Wash. C. C. 280; *Leathers v. Com. Ins. Co.* 2 Bush (Ky.), 298; 4 East, 410; *Ib.* 407.

It may be questioned whether [the rule by which] war renders a contract void, or only suspends its enforcement, is dependent so much upon its character as "executed" or "executory," as upon the question whether they give aid and comfort to the enemy; and, second, whether they involve intercourse.

If the war had the effect to annul the insurance by this company on the life of Dr. Statham, he being a citizen of Mississippi, then it became and was annulled and dissolved on the day that the war began or was declared to exist by the proclamation of the President on August 16, 1861; although the premium note due the preceding 8th of December had been paid, and there was no default in any of the conditions at the time of the decease of Dr. Statham. Is there not a distinction which may be clearly discerned and which is substantial between a life policy and a marine policy? The cases cited go on the predicate that a contract of insurance is one of indemnity and tends to encourage the commerce of the enemy, which it is a main object of the war to prevent and destroy. Therefore, the subjects of one country shall not be permitted to lend assistance to encourage and promote, by insurance, the commerce of the other belligerent.

In what respect does a policy of life insurance, issued before the war, assist and strengthen the assured, or his country, in the prosecution of the war? All that can be done, or is required to be done, is to pay the annual premiums. If this could be done without sending the money to the insurer, it would, in no wise, increase the strength and power of the assured in his country to do hostile acts, nor would it diminish or affect the resources of the country of the assurer.

But analyze this policy, and its legal elements are these: The assured engages, upon the payment of so much down, and an

annual sum, so long as Dr. Statham lives, within sixty days after his death, on notice and proof of the fact, to pay to the owner of the policy \$5,000. Punctually the payment of the annual sums must be made, on the pain of losing the right to demand the \$5,000. (There are other conditions not important in this connection to be named.) When the war broke out the assured had done nothing; indeed no act of performance would devolve upon him until after the death of the assured. When that occurred the war was in existence, and he could not lawfully remit from New York the \$5,000. Was his duty to do so annulled or discharged, or the remittance postponed, until the impediment was removed, and intercourse and business might lawfully be resumed?

In what essential feature does this contract differ from an advance of money, made by a citizen of New York in 1851, on the bond of a citizen of this State, payable sixty days after the death of Dr. Statham, on the consideration of an annual payment of \$200? It would not be asserted that the war, *proprio vigore*, annulled the contract. It was legal when made. There was no legal impediment in the way when entered into. The war could have no other effect than to suspend [the] remedy upon it or performance of it, because of the interdict of all commerce and intercourse between the parties. But the contract between the insurance company and complainants' mother has an additional feature; that, if the annual premiums are not punctually paid, the policy should be of no effect, but shall cease and determine. But the bill alleges that a tender was made to the agent of the defendants of the premium on the 8th December previous to the death of Dr. Statham. The war did not put an end to his agency. In *Morey v. Clark*, 10 Johns. 69, it was determined that an alien enemy, resident in the United States during a war between his country and the United States, could sue and be sued. If he may sue for a debt, *a fortiori*, he may receive it without suit. It was ruled on the Pennsylvania circuit, by Judge Washington, in *Conn v. Penn and Denniston*,¹ and *McGregor v. Imbrick*,² that debts might well be paid to the agent of an alien enemy residing in the United States, but that "remittance" to the principal could not be made pending the war. In *Buchanan v. Curry*, 19 Johns. 140, arising upon a contract for the sale and delivery of lumber, made between a British subject and a citizen of New York just before the War of 1812,

¹ Peters C. C. 496.² Qu.?

Statham v. New York Life Insurance Company.

it was held that the delivery of the lumber after the war begun, to a resident agent of the alien enemy, was a valid act, not inhibited by the international law. It was pressed by counsel that the war revoked the agency, and made all dealings, directly or indirectly, with an alien enemy illegal. To that the very able judge, responding for the court, said, "The rule (invoked) is founded in public policy which forbids, during war, that money or property, or other resources, shall be transferred so as to aid or strengthen the enemy." The evil and mischief which the principle condemns is, the "exportation" of money or resources, and not in delivering or paying them to an alien enemy residing here, or his agent, under the control of the government. To the same effect is *Denniston v. Imbrie*, 3 Wash. C. C. 396, *supra*; *Paul v. Christie*, 4 Harris & McHenry, 161; *Ward v. Smith*, 7 Wall. 452; *United States v. Grossmayer*, 9 Ib. 75.

The war then did not, *per se*, revoke the agency of Brown, nor make it unlawful for him to receive the premium which was tendered December 8th, 1861. A payment to him would have been a discharge of the debt. The policy of war interdicted his remittance of the money to his principal, for that would have implied intercourse, and would have aided the other belligerent with the sinews of war. His performance of that duty would be "suspended" until the war was over.

Griswold v. Waddington, 16 Johns. 438, is a most exhausting research into the authorities, as to the effect of war upon the relations of the inhabitants of the respective belligerents. As a general proposition, war suspends the performance of *ante bellum* contracts, and denounces as illegal and invalid those made *pendente bello*. If an *ante bellum* contract is dissolved at all, it is because its performance is inconsistent with the duties and allegiance which the parties owe to their respective countries, and involves some violations or infringement of these, and which has not been performed in whole or in part by either party. The annihilation of such a contract would not be injurious to either party, but would rather dissolve their inconvenient relations. But if the contract has been partly executed by one party, by parting with money or other valuable things, on the consideration and promise that the other will perform his part of the engagement, it would be gross injustice, and repugnant to reason that intervening war should destroy the contract, devolving all the loss upon one party to the gain of the other. Nor should that be

so unless an overruling policy should so require, — such as to continue the contract in force, or to attempt its performance, [which] would necessitate intercourse, commerce, or the exchange of money or property between the respective parties, which would be inconsistent with their changed relations superinduced by the war. If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, then no principle of law or policy, arising out of a state of war between their respective countries, would demand an abrogation of the contract, or its non-performance. Reason is the life of the law, and when it ceases the law itself dies. A contract made in 1860, by a citizen of this State, to deliver cotton to a citizen of New York, on the 1st day of October, 1861, at Vicksburg, is not necessarily annulled by the war. If delivery had been made to the agent of the purchaser at Vicksburg, it would have been a legal act contravening no policy or law of war, and the right of the seller to recover the price, after the war, could not be disputed. If the agent had attempted to transport the cotton to New York pending the war, then and not until then would criminality attach.

But there is another view of the subject arising out of the statute regulating foreign insurance companies doing business in this State. Code of 1857, p. 303. They are required to file in the office of the auditor of public accounts a statement of their capital stock and resources, [and] appoint an agent before they begin to do business. This agent as fully represents the corporation here as their officers in the state of their domicile. Service of legal process upon him is of the same virtue as if upon the corporation. In effect, the corporation acquires a *quasi* domicile here, and through its resident agent must transact its business. It is not permitted to withdraw its funds derived from premiums upon risks until losses have been adjusted. The defendant assumed the risk in dispute under the terms and responsibilities of this law, among which was the condition that it shall appoint an agent, through whom contracts of insurance shall be made, to whom premium payments may be made, and by whom obligations incurred by them shall be discharged and paid. The plain intent of the statute is to localize the contract in its inception, and in the several stages of its performance. It may be seriously doubted whether, since this contract was made under this condition of the law, the defendants ought to be heard to insist upon

Statham v. New York Life Insurance Company.

a forfeiture of the policy for non-payment of the premium at their home office, when there was no legal impediment to the continuance of an agency here. Foreign companies, dealing with our citizens under this law, must be considered as engaging to accept performance from the assured here, and on their part to pay losses here. These views are in the main sustained by *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179,¹ and *The Manhattan Co. v. Warwick*, 20 Gratt. 614,² by a majority of the court, and by *Hamilton v. Mutual Ins. Co. of New York*,³ by Judge Blatchford, in the circuit court of the United States for the Southern District of New York, whose opinion we have seen.

But it is said by counsel for appellees that the demurrer ought to have been sustained, because the bill does not negative and obviate all the conditions of the policy upon non-compliance with which it became void and of no effect. In order to indicate this infirmity in the bill, resort is had, by counsel, to the policy, which is made an exhibit thereto. It was recently determined by this court that a demurrer only brought into view the allegations of the bill, and that the chancellor was confined to them in determining whether the exceptions made in the demurrer were well taken or not; that the exhibits could not be looked to, either to aid a defective and insufficient statement of the title to relief and discovery, or as taking away and defeating such right. They were rather evidence than pleading.

We are not permitted, therefore, to depart from the allegations of the bill, or to consider them in connection with the exhibits, in determining whether the demurrer should be sustained or not. Looking to the bill in this aspect, it does disclose a *prima facie* right to relief, and that is all that is required. The assurer may overcome this *prima facie* case by averring and proving a forfeiture of a right to the money, by non-compliance with one or more of the conditions imposed on the assured, which, by the contract, would produce that result.

These views embrace all the points necessary to be considered in order to dispose of the case. It would be unnecessary to consider separately the numerous causes assigned in the demurrer.

Wherefore the decree of the chancellor, sustaining the demurrer and dismissing the bill, is reversed, judgment rendered here overruling the demurrer, and

Cause remanded.

¹ *Ante*, vol. 2, p. 709.

² *Ib.* p. 168.

³ *Post*, p. 787.

MISSOURI.

HENRY GAMBS, Public Administrator, appellant, *vs.* COVENANT MUTUAL LIFE INSURANCE COMPANY, respondent.

(50 Mo. 44. Supreme Court, 1872.)

Policy of insurance by husband for benefit of wife made payable to second wife. — At common law, and prior to the statute, (Wagn. Stat. 936, § 15,) the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid; and where the husband died during the life of his wife it would be enforced. But not as to her legal representatives where the husband survived her. The only ground upon which the policy could be sustained when issued was the fact that the wife had a right to look to her husband for support. That object being lost by her death, the husband would not be bound to continue the policy for the benefit of her legal representatives. And he might change the policy for the benefit of a subsequent wife.

APPEAL from St. Louis circuit court.

George Denison, for appellant.

Dryden & Dryden, for respondent.

BLISS, J., delivered the opinion of the court.

In 1853 defendant issued a policy of insurance upon the life of William Holliday, husband of plaintiff, Amanda, payable to her or her legal representatives. In 1856 his said wife Amanda died; but her husband, who had all along paid the premiums, continued to pay them until February, 1860, when, having remarried, he procured a memorandum upon the policy that it should stand for the benefit of his then wife and others named. Said William Holliday continued to pay the premiums until 1868, when he died; and on due proof of his death the defendant paid the amount called for by the policy to the beneficiaries named in the memorandum. The plaintiff sues for the amount of the insurance, claiming that it belongs to the representatives of the deceased wife.

No instructions were given and no exceptions were taken to any ruling of the court; hence the defendant contends that there is nothing for us to review. But the facts are all admitted upon the record, and we must pass upon their legal effect. It is only when they are disputed, and when there is evidence tending to sustain the claim of each party, that the losing one is concluded by the finding in the trial court.

Gamb's v. Covenant Mutual Life Insurance Company.

It will be perceived that the policy was issued and the wife died before the adoption in this State of the statutory provision expressly authorizing policies in the name of and for the separate use of the wife. It is hence contended that as a common law policy it is void, inasmuch as the wife had no such insurable interest in the life of the husband as would sustain it.

Gambling or wager policies are those where the persons for whose use they issue have no pecuniary interest in the life insured. But the wife has a direct interest in the life of the husband. The law requires him to support her, and in most cases she is actually dependent upon him for support. This creates an interest, and her relation is not the same as that of a wife or child to the husband or father who takes out a policy upon their lives for his own benefit; and the language of Kent, (3 Com. 368,) that "the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent," does not authorize the conclusion that a wife has no pecuniary interest, independent of the statute, in the life of her husband. Judge Scott, in *McKee v. Phoenix Ins. Co.* 28 Mo. 383,¹ whose opinion is criticised by counsel, takes, I think, a more sensible view of the question.

The original policy, then, must be treated as valid; and had the husband died during the life of the beneficiary, its conditions having been fulfilled, it could have been enforced. But it does not follow that the action of the husband, after the death of the wife, must be held to have been for the benefit of her representatives. The only ground upon which the policy could be sustained when issued is the fact that the wife had a right to look to the husband for support. It was taken out for the purpose of securing her support after his death. The premiums were paid by him, and the whole thing was instituted and carried on for this laudable purpose. This object being forever lost, was the husband bound to continue the policy for the benefit of her representatives? Could he not surrender it, or, by failing to pay further premiums, let it lapse? Or could he not, with the consent of the company, change the beneficiaries? He must be held to have had that right. It amounts to a surrender of the old policy

¹ *Ante*, vol. 1, p. 806.

Gambs v. Covenant Mutual Life Insurance Company.

and the issue of a new one. Every payment made after the change was in the interest of the present wife. Suppose he had refused to pay at all, where would be the plaintiff, and what could he recover? The payments upon renewal were not for his benefit, and he has no claim to that which they secured.

The right of the husband, after the wife's death, to dispose of a policy obtained by him for her benefit is sustained by the supreme court of Wisconsin in *Kerman v. Howard*, 23 Wis. 108,¹ and I know of no case where the husband would be required to keep the policy alive for the benefit of his heirs.

The judgment will be affirmed. The other judges concur.

Note. — This case is open to criticism. It was unnecessary to decide the settled point that the wife had an insurable interest in the life of the husband. A person has an insurable interest in his own life, and can make a policy thereon payable to any one whomsoever, regardless of interest. See *Campbell v. New England Life Ins. Co.* 98 Mass. 381; *S. C.*, ante, vol. 1, p. 229; note to *Franklin Life Ins. Co. v. Hazzard*, ante, p. 564.

¹ *Ante*, vol. 1, p. 728.

NEVADA.

SARAH J. COOPER, appellant, *vs.* THE PACIFIC MUTUAL LIFE
INSURANCE COMPANY OF CALIFORNIA, respondent.

(7 Nev. 116. Supreme Court, 1871.)

Delivery of policy. — Where a wife made application to the agent of an insurance company for a policy on the life of her husband, and paid fifty dollars in accordance with the company's rules, which was to be applied to the first year's premium provided the risk should be taken; and in due time a policy was made out and forwarded to the agent for delivery; but before it was delivered the husband died, whereupon the agent, though tendered the balance of the premium, refused to deliver it; *held*, that there was a valid contract for a policy; that upon the taking of the risk the fifty dollars became the property of the company, and the assured became entitled to the policy; and that such a contract was as available to sustain an action for the amount of the insurance as if the policy had been delivered.

APPEAL from the district court of the First Judicial District, Storey County.

The defendant is a corporation organized under the laws of the State of California, and having its principal place of business in the city of Sacramento in that State. The application for insurance was made at the town of Winnemucca, Nevada, in October; the policy appears to have been issued at Sacramento, California, on or about November 5th; and James A. Cooper, the husband of plaintiff, died November 7th, 1870.

R. S. Mesick, for appellant.

Mitchell & Stone, for respondent.

By the Court, LEWIS, C. J. An appeal was brought in this case, but upon discovering that the statement prepared was not settled by the judge below as required, the appellant moved for leave to withdraw it for the purpose of correcting the omission. In conformity with the application, an order was made by this court dismissing the appeal without prejudice. The statement being corrected, the case is again brought up; but it is argued for the respondent that the dismissal of the first appeal operated as an affirmance of the judgment, and therefore an appeal cannot again be taken.

This objection is clearly not tenable. It has been held, it is true, that the dismissal of an appeal for the want of prosecution,

Cooper v. The Pacific Mutual Life Insurance Company of California.

or upon the merits, operates as an affirmance of the judgment. *Karth v. Light*, 15 Cal. 326. But in that very case it was held, that if the dismissal be upon some technical defect in the preparation of the appeal, it has no such effect, the court saying: "The cases in which the dismissal of an appeal will not operate as a bar to a second appeal, are those where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like. The bar applies where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits." This is the extent of the rule laid down in the cases relied on by counsel. It is also doubtful whether thus modified it can be maintained as a correct rule of law, for it has been held otherwise by courts of undoubted ability. 20 Wis. 644; 1 Duer, 252.

But whether it can or not need not be determined here, for it is evident this case comes within the rule followed in *Karth v. Light*. The appeal was not dismissed for want of prosecution, or upon the merits, but solely for the purpose of correcting an error, or supplying an omission, which had happened in its preparation. So, too, the order of dismissal expressly provided that it was made without prejudice to another appeal. This of itself is a sufficient answer to the objection of counsel, independent of any other consideration.

The questions submitted for decision upon the record are: first, whether the evidence is brought up in such a manner that it may be reviewed; and if so, then, second, whether the court below ruled correctly in taking the case from the jury and nonsuiting the plaintiff. The plaintiff appeals from the judgment alone, no motion for a new trial having been made. A statement on appeal was prepared, which embodied the evidence introduced on behalf of the appellant, the motion for nonsuit, together with the exception to the action of the court in granting it. Respondent now argues that the inquiry of this court must be confined to the judgment roll alone, as the evidence cannot be considered except where a motion for a new trial has been made. It is true, this court cannot weigh the evidence for the purpose of determining whether a verdict or judgment is sustained by the evidence; but any question of law arising at the trial and properly excepted to can be reviewed without a motion for new trial, and in such case so much of the evidence as may be neces-

Cooper v. The Pacific Mutual Life Insurance Company of California.

sary to explain the legal question should be brought up and considered.

It is never held that a mere question of law cannot be reviewed except when a motion for a new trial has been made. Nor can it, with any degree of plausibility, be argued that such is the rule. It is the every-day practice under the new system, as well as the old, to take cases to the appellate courts upon bill of exceptions, upon which all rulings raising legal questions may be reviewed. Will it be argued, for example, that a question growing out of the instructions or charge to the jury cannot be reviewed, except when a motion for a new trial is made? Certainly not; and still it is almost invariably necessary in such cases to review some of the evidence, to enable the appellate tribunal to obtain an understanding of the question. Indeed, so it is with nearly every question of law raised at the trial; it can only be understandingly brought to the attention of the court of review by presenting the evidence bearing upon and illustrating it. A motion for new trial is not only unnecessary to authorize a review of rulings at the trial, but the much preferable practice is to bring them up by bill of exceptions, or in a statement on appeal, as the same object is accomplished without the expense and unnecessary labor of such motions. Thus, a party who wishes only to have the questions of law arising during the progress of the trial reviewed, may introduce the rulings with sufficient evidence to point them into his statement on appeal, or prepare a bill of exceptions as he proceeds, and so bring them to the attention of the appellate court. This is a practice which, under similar statutory provisions, has not only received the sanction, but commendation, of the supreme court of California. *Brown v. Tolles*, 7 Cal. 398; *Harper v. Minor*, 27 Cal. 107; *Carpenter v. Williamson*, 25 Cal. 158.

Whether a case should be withdrawn from the jury and the plaintiff nonsuited, is purely a question of law. When properly made, it is simply a decision that the law affords no relief upon the evidence adduced, admitting every fact and conclusion which it tends to prove. It is not a decision upon the weight of evidence where it is conflicting, but that it is not sufficient to justify its submission to the jury. If it were not a question of law, a nonsuit could never be granted; for the judge can only decide questions of law. But independent of reason, such is undoubtedly

Cooper v. The Pacific Mutual Life Insurance Company of California.

the law. *Pratt v. Hull*, 13 John. 335. If so, this point is settled, for there is no difference between this and any other law question as to the manner in which it may be submitted to the appellate court. Being simply a question of law it could be brought to this court as well by bill of exceptions, or by statement on appeal, as by appeal from an order on motion for new trial.

Was the court warranted in granting the nonsuit? Clearly not. [The plaintiff introduced evidence going to prove that an application was made to the agents of defendant for a policy of insurance on the life of the plaintiff's husband; that at the time the application was made, fifty dollars was paid, according to the regulations of the company, which was to be applied on the first year's premium, provided the defendant should conclude to make the insurance. The application thus made was forwarded to the proper office of the company; a policy was in due time made out and forwarded to the agent in this State for delivery; but the insured having died before it was delivered, the agent refused to deliver it, although demanded, and [to receive] the balance of the premium offered to be paid.

Here is undoubtedly sufficient proof to establish a contract for a policy. The application for a policy by the assured, with the payment of a portion of the premium, and acceptance of the risk by the defendant, left nothing to be done but the delivery of the policy, and the payment by the plaintiff of the balance of the premium, which, it appears, was not required by the rules of the company until the completion of the transaction. These facts show a valid contract for a policy between the parties. The moment the company concluded to make the insurance, the fifty dollars paid to its agents became its property, without any further action on its part. It was paid upon the condition that if the company concluded to make the insurance, it should be applied in payment of the premium; when, therefore, the risk was taken, it became the property of defendant, and at the same time the assured became entitled to the policy. Thus there was the acceptance of the application by the company, and the payment of a portion of the premium, as a consideration therefor, by the plaintiff, which is all that was necessary to make a valid contract between the parties. Such contracts are as available to sustain an action for the amount of the insurance as if the policy itself had been issued. In *Kohne v. The Insurance Company of*

Cooper v. The Pacific Mutual Life Insurance Company of California.

North America, 1 Washington C. C. 93, a person applied to the agent of the company to effect an insurance on goods on board a ship, and settled all the terms of the insurance, but did not receive a policy. It was, however, soon afterwards filled up and executed, and about the same time the company received the intelligence of the loss of the vessel. On a subsequent day the assured called to pay the premium and receive the policy, but the company refused to deliver it, objecting that the agreement was inchoate, and consequently it had the right to retract. Judge Washington, however, said: "It appears everything was agreed upon, and although, on account of the fever then in the city, he did not wait to receive the policy, yet it was immediately after he left the office filled up and signed by the president, and has been produced on the trial; the contract therefore was not inchoate, but perfected before notice of the capture by either party." So it has frequently been held that the premium may be received on a mere contract to insure, where no policy has been made out; and such, we take it, is the law. *Carpenter v. The Mutual Safety Insurance Company*, 4 Sandf. Chan. 408; *Hamilton v. Lycoming Insurance Company*, 5 Barr, 339; *Andrews v. The Esser Fire and Marine Insurance Company*, 3 Mason C. C. R. 6; *McCullough v. Eagle Insurance Company*, 1 Pick. 278; *Palm v. Medina Insurance Company* 20 Ohio, 529; *Tayloe v. Merchants' Fire Insurance Company*, 9 Howard U. S. 390.

The nonsuit must be set aside.

Judgment reversed. It is so ordered.

NEW JERSEY.

HENRIETTA HILLYARD *et al. vs.* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(6 Vroom, 415. Supreme Court, 1872.)

Effect of war. — A stipulation in a policy of life insurance that the insurance shall be void if the annual premiums shall not be paid at the time designated, does not apply to a contingency occasioned by the act of God, or of the law, rendering such payment impossible.

The effect of a war between the governments of the assurer and assured is to excuse the non-payment of such premiums on the contract days.

THIS was a suit on a policy of life insurance, dated December 27th, 1849. The plaintiffs were the daughters of John H. Hillyard, and the declaration stated that, being interested in the life of their father, they, by one Edwin Hillyard, "their trustee and agent," entered into an agreement with the defendants, in and by which said agreement it is recited that the said defendants, in consideration of the sum of \$302.50, to them in hand paid by Edwin Hillyard, trustee, and to the annual premium of \$302.50, to be paid on or before twelve o'clock, M., on the 27th day of December, in every year during the continuance of that policy, do assure the life of John H. Hillyard, of Richmond, in the county of Henrico, State of Virginia, (meaning thereby the father of the last-named plaintiffs,) in the amount of \$5,000, for the term of life, &c.

Among the conditions expressed in the policy was the following one, viz.: "That in case the said Edward [Edwin?] Hillyard, trustee, should not pay the said annual premiums on or before the several days therein beforementioned for the payment thereof, then and in every such case the said company should not be liable to the payment of the sum insured, or any part thereof, and that the policy should cease and determine; and that it was thereby further agreed that in every such case where the policy should cease and become null and void, the previous payments made therein, and all profits, should be forfeited to the said company."

It was then stated that the trustee paid the annual premiums

Hillyard v. The Mutual Benefit Life Insurance Company.

"up to and until" the 26th day of December, 1861; that for a long time before and after that date the plaintiffs and the said trustee were inhabitants of Virginia, and the defendants were inhabitants of the State of New Jersey, and that on the 1st day of December, 1861, the President of the United States, by virtue of the power and authority in him vested, and according to the statute, &c., had, by his proclamation, bearing date, &c., declared that the inhabitants of the said State as aforesaid, inhabited by the said plaintiffs and their said trustee, and the section or part of the said State so inhabited by them, were in a state of insurrection against the United States. And that the said proclamation remained in force, and the state of insurrection and condition of hostility therein declared to exist continued for a long space of time, &c., by reason whereof all commercial intercourse, &c., continued to be unlawful and impossible, and during all that time hindered the payment of said annual premiums.

The declaration then alleged a tender after the war.

There was a general demurrer to their declaration.

Argued at February term, 1872, before Beasley, Chief Justice, and Justices Scudder and Van Syckel.

For plaintiffs, *J. Dixon, Jr.*

For defendants, *F. H. Teese.*

The opinion of the court was delivered by

BEASLEY, C. J. This suit is on a policy of life insurance made by the defendants, a corporation created by the laws of this State, in favor of the plaintiffs, who were residents of the State of Virginia; the person whose life was insured was also a resident of this latter State. The payments of the annual premiums were intermitted during the recent civil war, and the life insured terminated during such intermission. The policy contained the usual clause, that in case the annual premiums should not be paid on or before the days designated, the company should not be liable to the payment of the sum insured, and that the policy should cease and determine. It was this last provision which gave rise to the first objection of the present action, taken on the argument before the court.

The declaration admits that the premiums were not paid according to the terms of this stipulation, and that the death occurred during the period of such non-payment. The existence of the civil war is relied upon as an excuse for this default.

Hillyard v. The Mutual Benefit Life Insurance Company.

No one can doubt, at the present day, that a war, either foreign or domestic, puts an end, during its continuance, to all amicable intercourse between the citizens of the respective belligerent powers. In this respect all judicial decisions, as well in England as in this country, agree with the opinions expressed by the publicists, and with the practice of all civilized nations. The interdiction extends to every species of friendly communication. All contracts made with an enemy during war are void, and all payments of debts or remission of funds, under similar circumstances, are illegal and forbidden. As the doctrine is expressed by the English jurists, there cannot exist, at the same time, a war for arms and a peace for commerce; the principle being, that the belligerent condition places every individual of the respective governments as well as the governments themselves in a state of hostility.

By force of this rule, the payment of these premiums at the stipulated times became legally impossible. If they had been tendered, the defendants could not, without doing an unlawful act, have received them. Both the payment and the receipt of moneys would have been a breach of duty and of law. The question is, whether the act of payment having become thus illegal, the performance of such act was not excused.

The exact performance of the contract on the part of the assured has been rendered legally impossible by the act of the law, and as such occurrence was not a contingency which can reasonably be supposed to have been within the contemplation of the contracting parties at the time they bargained, I think this failure, in a strict compliance, is not a legal breach of the agreement. The reasonable and true doctrine seems to be, that express terms are necessary to create an obligation, which will include a liability in case of an unanticipated prevention by the act of God, or of the law, of a fulfilment of a stipulation. In the absence of such an expressed intention, there is always an implied understanding that the doing of the act agreed to be done shall not become absolutely impracticable from a remote and unexpected event; occasioned by a natural or legal agency. This rule, as well as its conditions and limitations, is clearly marked in the judicial decisions; and, as an ancient illustration, I refer to the case of *Lawrence v. Twentiman*, 1 Roll. Ab. 450, Condition G, pl. 10, where it was ruled that if a man covenant to build a house before a cer-

Hillyard v. The Mutual Benefit Life Insurance Company.

tain day, and the plague breaks out in the place where the house is to be built, before the day, and continues till after the day, the covenantor is excused from the performance of the covenant at the day, for the law, it is said, will not compel him to venture his life, but he may do it after. Another example occurs in *Williams v. Lloyd*, W. Jones R. 179, in which the declaration stated that the plaintiff delivered a horse to the defendant, which the defendant promised to redeliver on request, and a defence was sustained which set up that the horse died before a request to redeliver him. Lord Coke, 1 Inst. 216, a, b, expresses the same rule, saying: "That where a condition of a bond or recognizance becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved; as if a man be bound by recognizance or bond, with condition that he appear at the next term of such court, and before the day he dieth, the recognizance or obligation is saved." This rule, as thus expounded, was applied and enforced by the supreme court of New York, in the case of the *The People v. Manning & Condit*, 8 Cow. 297, and its existence is very pointedly recognized by Lord Ellenborough in *Barker v. Hodson*, 3 M. & S. 270. The doctrine was much considered and discussed in the modern case of *Hall v. Wright*, El., B. & El. 746 (96 E. C. L. R.), which was an action for breach of promise of marriage; and in the several opinions read in the case, it seems to be expressly stated or impliedly assumed, that if the performance of the promise had become impossible by the act of God, as by a visitation of grievous sickness, it would have been an excuse for non-performance. It is true that in judicial dicta and in the works of some of the text writers, it is affirmed as a general rule or principle of law, that whenever a party enters into some unqualified agreement to do some particular act, that the impossibility of performance occasioned by inevitable accident, or an unforeseen occurrence over which he had no control, will not release him from his contract. Mr. Addison, in his *Treatise of Contracts*, thus declares the law, but an examination of the cases cited will show that the deduction made by him is not warranted; the examples adduced are all cases of difficulty, and not of impossibility of performance. This erroneous statement of the rule — erroneous on account of its universality — seems to have proceeded from the leading case of *Paradine v. Jane*, Aleyn 26, in which the distinction is drawn between such

duties as the law charges upon a party and those which he voluntarily assumes, the difference being that it is only in the former class of cases that non-performance will be excused when it arises from inevitable necessity. The reason given for this discrimination is, that in instances of self-assumed obligations, provisions should be made for the contingency set up as an excuse for non-compliance with the express stipulation. The rule in the case cited is expressed in too general terms; but limiting it, as it should be limited, by its application to the facts to which it belongs, it is correct. The action was in debt for rent, and the defendant pleaded that he had been expelled from the premises demised and from the profits, by the public enemy. Obviously, this was not a case of impossibility of performance, for it was simply a hardship for the tenant to pay rent when no benefit had accrued to him from the property. There could be no reasonable inference from the conditions of the case that the parties intended that the rent was not to be exacted in the event of the possession of the premises being lost to the tenant. Whether a contract is to be operative in the event of performance becoming impossible, is a question as to the intention of the parties.

There are few contracts, if any, which express, in terms, the full meaning of the contractors under all possible circumstances, and hence the limitations and incidents which the law so often supplies. It is not intended to be questioned that when a contract is made in intelligible terms, which are sufficiently specified, the law will neither add to nor take anything from it; but when general terms only are used, and remote contingencies arise, rendering a strict compliance impossible, then it becomes obvious that to give full effect to such general terms would often be to lend them a force which might lead to injustice and to results quite aside from what was contemplated. For example, if a man promise, in an unqualified form, that he will write a certain treatise or paint a certain picture within a given time, it would hardly be claimed that his death before the lapse of the period would not excuse his non-compliance of the very terms of his agreement. This limitation of the language used would be deduced from the nature of the undertaking, which required for its performance the personal service of the promisee, and from the consequently well founded inference that it could not have been intended to regard the contract as broken if death intervened.

Hillyard v. The Mutual Benefit Life Insurance Company.

Such promise is unconditional and absolute, but its generality is restrained by an implication which belongs to the very substance of the transaction. On the other hand, as an illustration of the opposite class of cases, when a tenant agrees in an unrestricted form, to pay a certain rent, he will not be released by a destruction of the premises from natural causes, the reason being that such casualty is not unusual, and was probably within the contemplation of the contracting parties, and performance, though a hardship, is not impracticable. The distinction, I think, is a plain one, and establishes a rule which is indispensable, if courts are to enforce the real design and will of those who impose duties upon each other through the medium of agreements. It is so seldom that persons would be willing to bind themselves for the consequences of a breach of contract occasioned by the act of God or that of the law, that I think it is safe to lay down the rule that such an obligation will not be deduced from general terms, but that a specific stipulation is necessary to produce such a result.

A strong case in favor of controlling a stipulation couched in general language is afforded by the decision of Lord Ellenborough in *Brandon v. Curling*, 4 East, 417. The suit was on a marine policy containing the usual clause of indemnification against all captures and detention of princes. The vessel had been taken by the government of the underwriter, and the decision was to the effect that the insurance, though general, must be considered as containing an exception against a loss happening during the existence of hostilities between the respective countries of the assured and assurer. I cannot find that it has ever been ruled that if the performance of a promise turns out to be impossible without the fault of the promisor, that the performance will not be excused unless the contract, in express and specific terms, provided for the event occasioning the impossibility. Applying this rule to the facts now under judgment, I conclude that the intermission of these payments was excused on the force of necessity, and because the parties did not contemplate the occurrence of such necessity, and, consequently, did not provide for it. It is very unreasonable to infer that it was the intention that a forfeiture should be incurred if the insured, by no fault of his, but from the intervention of the law, failed to fulfil his contract with respect to punctuality of

Hillyard v. The Mutual Benefit Life Insurance Company.

payment. According to the view of the defendants, and regarding this stipulation as unqualified, if the insured, on one of the days for annual payment, being on his way to settle the premium, had been taken with a sudden sickness and had remained in a state of insensibility until the time for payment had passed, all his interest in that policy would have been irretrievably forfeited. So unreasonable a force should not be given to this provision. In my opinion, the payment of these several premiums on the contract day was excused, from the fact that such payment was rendered impossible by the war. The true meaning of the agreement, read in the light of its necessary implications, is, that the premiums were to be paid at the time specified, unless prevented by the act of God or of the law. A legal interdict was temporarily imposed on such payment, and the effect was to suspend the obligation to pay ; but such suspension did not affect the obligations of the defendants. To hold that the liability of the defendants was suspended, would be to declare a forfeiture *pro tanto*.

When the subject matter of the contract does not become unlawful, and it has been in some degree executed, so that the parties cannot be restored to their original condition, the contract, although for the time being some of its terms are not capable of performance, is not in a posture to be rescinded, either in whole or in part. When such a result is not absolutely inevitable, and when it would lead to injustice, it does not take place. Whenever the law interferes with the contract, it should be held that such interference will disturb the intentions of the contracting parties to the least degree practicable. Judge Washington, in a case in which it was held that an embargo temporarily preventing the performance of a contract did not destroy its obligations, recognized the principle to which I refer. He says : " Where the rule applies that if the law forbids the performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the shipowner is disabled from commencing his voyage at the specified time, but he is bound to go when the prohibition is removed. A strict performance is prevented by the law, and the law excuses it." *Odlin v. Insurance Co.* 2 Wash. C. C. R. 317. There can be no question but that it is in some degree a hardship on these defendants to have their responsibility kept alive during the time the benefits of the contract were not fully enjoyed by them ; but

Hillyard v. The Mutual Benefit Life Insurance Company.

it is to be remembered that whenever the law interferes and ties up a party from performance, some hardship is the inevitable result. Postponements of performance on the one side will generally be injurious to the other. Such results cannot be avoided — they are not uncommon. It has been repeatedly decided that when the payment of a debt is suspended during the war, the interest of the debt is lost to the creditor. Such losses are within the scope of the contracts with which they are connected, construing them by their express terms and their legal implications. In fine, I think the tendering of these premiums was, in legal effect, a compliance with the plaintiffs' stipulation in that respect.

But there is also a narrower ground upon the first point, which will preclude the objection resting on the alleged default of the plaintiffs. It is this: the declaration shows that the defendants, by the interdict of their own government, were disqualified, during the period in question, from receiving the several premiums remaining unpaid. Under such circumstances, it would be strange if the defendants could set up that the plaintiffs had lost all their rights under this policy because they omitted to do an act which would have been confessedly nugatory — that is, to tender these moneys which, of necessity, must have been rejected by the defendants.

I do not know of anything analogous to such a pretension having a place among legal principles. The defendants cannot be permitted to impute a result occurring from their own incapacity, as a breach of agreement on the part of the plaintiffs.

The second exception taken at the argument of this action was that this contract of insurance was a continuing contract, and was, on this account, *ipso facto* avoided by the occurrence of the war.

This contract clearly could not have been originated during the prevalence of hostilities. To insure the life or the property of an enemy while war was being waged would be an illegal act. Such a contract involves an active intercourse, and, in a state of war, as has been already remarked, all intercourse of a commercial or amicable nature is prohibited. But the contract in question was made while peace prevailed, and was, consequently, lawful in its inception; and as the payment of the premium was suspended, its continuance was not dependent on the

doing of any act on the part of the company or of the assured. It has been repeatedly said that a continuing contract is dissolved by a condition of hostility, but I have not anywhere found that a contract which has been partly performed, and which still remains in force from its own intrinsic quality, without the doing of anything by any party to it, is thus destroyed. Nor can I conceive why a continuing contract, in part executed, should be annulled from this cause, except on the ground that it calls for some kind of intercourse which is inconsistent with the duty of citizenship. The question has not as yet received any decision which is to be regarded as entirely authoritative. It is still open, and is to be settled by a reference to general considerations and by the application of analogous principles.

Whether a state has a right, according to the established rules of modern national law, to confiscate the property of an enemy found in its own dominions, is a question about which the most eminent of the writers on public law are not agreed. Those among them who construe the rules of war with severity maintain the existence of such a right, but the number and weight of authority are opposed to such views. But, in this country, the question is at rest, for there are several adjudications of the supreme court of the United States in favor of the more rigorous rule. But whilst this harsh doctrine has thus been established, it is attended with this qualification, that to effect such confiscation an act of Congress is requisite. The result is, that an enemy's property found in this country on the breaking out of hostilities is, in the absence of all action of the national legislature, not liable to forfeiture. Debts due from a citizen to an enemy stand on the same ground: they can be seized by the legislative pleasure, but are not confiscated by mere belligerency. "We may therefore lay it down," says Chancellor Kent, "as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy;" but, as it is asserted by the same authority, "this right is contrary to universal practice, and it may therefore well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times."

A just appreciation of this principle, and a proper application

of it, seems to me to lead very plainly to a result adverse to the position taken by the counsel of the defendants. If tangible property and debts are not confiscated by a condition of war for the benefit of the public, how can it be plausibly urged that a vested right, such as arises out of the present policy, is to be forfeited by the operation of the same cause, for the benefit of one of the contracting parties? To properly understand the exorbitance of such a claim, we have but to consider the character of the right thus sought to be seized. An insurance company agrees to pay a stated sum of money on an event that is certain to happen. In consideration of this promise, annual payments are to be made which, in the progress of time, often exceed the sum for which the life is insured. Each day as it passes adds to the value of the interest which the assured has in the policy. When the life insured is nearly spent, the value of such interest approaches its maximum, and there is not much less than the interest which a man has in a debt just falling due. To illustrate this: a life of thirty years' standing is insured for \$50,000; premiums are annually paid, and at the age of eighty or ninety, no one will doubt that the assured has an interest in the \$50,000 which falls little short of a present ownership. And it is such an interest as this which it is claimed a state of war, *proprio vigore*, vests indefeasibly in the insurance company.

It is admitted that if the life had fallen in before the war, and the liability of the company had thus become fixed as a debt, the effect of the war would have been merely to suspend the payment of such debt. A discrimination between a vested interest of this kind which is maturing, and a debt growing due, is altogether too artificial and imaginary to be legal. The rights of the assured should not be thus sacrificed, nor should an insurance company be allowed to seize to itself this property, unless it can be shown that such consequence is inexorably demanded from motives of public policy. Reflection upon the subject has satisfied me that a continuance, during the progress of a war, of an insurance on the life of an enemy, is not inconsistent with the welfare of either of the belligerents. What effect can the existence of such a contract have upon the public interests of the one or of the other? If money for a past consideration fall due, after a declaration of hostilities, the debt is not cancelled, but the payment of it is suspended until peace is proclaimed. The reason why the debt is

Hillyard v. The Mutual Benefit Life Insurance Company.

allowed to be preserved is, that the existence of such debt does not work any injury to the government of the debtor; and the reason why the payment is suspended is, that the receipt of the money would be a direct contribution to the pecuniary resources for hostile uses of the government of the creditor. And so clearly has this principle been acted upon, that it has, on many occasions, been decided that the payment of a debt due to an enemy is allowable, if made to an agent of the creditor residing under the dominion of the government of the debtor; the money, in such case, not being drawn beyond the control of the latter government, for it would be clearly illegal for the agent receiving such payment to transmit the funds to his principal until the restoration of peace. It is incontestably plain, therefore, that the state of debtor and creditor, resulting from transactions anterior to the war, is not interdicted by the rules of national laws; and, as the continuance of the efficacy of a life policy can have no greater effect than to produce a state of debtor and creditor, how can such continuance be pronounced illegitimate? It was urged on the argument that the policy, if held valid, might be enforced, even though the life insured were lost in the war; but such a deduction is unfounded, for the argument can, by no reasonable construction, be so extended. It has already been shown that the English courts have long since declared that there was an implied condition in every marine policy that the promised indemnification should not be extended to losses occasioned by a capture made by the government of the underwriter.

A stipulation that the money should be payable, even though the life insured should be lost in a war which might arise between the States of the assured and the insurer, would be clearly illegal and void; and the consequence is, no such provision, which, if present, would vitiate the whole agreement, can be understood to be comprehended in the general expressions which are in common use in these policies. An exception is invariably implied, embracing every case of a loss of life by any means concerning which it would be criminal or incompatible with the law, or against the public interest, to stipulate or bargain. I cannot see that there is anything in either of the grounds thus taken, which should be permitted to defeat the action. The adjudications heretofore made on this subject, although the precise point of the present case does not appear to have been present in any of them,

Hillyard v. The Mutual Benefit Life Insurance Company.

exhibit a decided tendency to reject the doctrine that a policy of life insurance is avoided by a state of war, or by the non-payment of premiums during its continuance. *The Manhattan Life and Fire Insurance Company v. Warwick*, 20 Gratt. 614;¹ *Robinson v. International Life Assurance Company*, 42 N. Y. 54;² *The New York Life Insurance Company v. Clopton*, 7 Bush, 179.³

With respect to the formal exception that this action has not been brought in the name of the party to whom the promise was made, I do not think it should prevail. The general rule is that the suit may be brought on these policies, when in the form of simple contracts, in the name of the party having the beneficial interest. It is true that the agent who effected the insurance is styled in it a trustee, but that does not make him such, as his powers and capacities appear to be those only of an agent. The declaration would have been more consistent with correct theory, if it had laid the promise according to the legal inference to have been made to the plaintiff; but this is a defect of form which is cured by our statute, — at least when the exception is raised on demurrer. It was likewise urged that, by virtue of the incorporation of the defendant, the plaintiffs, as holders of a policy, became partners with the other corporators, and that the war dissolved such partnership. It does not seem to me that a state of war would, for reasons already given on another branch of the case, dissolve a partnership of this character; nor does it appear how such a dissolution, even if it took place, would affect the obligation of the policy; but it is enough at present to say that the pleading demurred to does not disclose the existence of such relationship, and that, consequently, the point is not now raised.

The plaintiffs are entitled to judgment.

See note to *Dillard v. Manhattan Life Ins. Co.*, ante, p. 548. No notice is taken of the fact that the death in the principal case occurred during the war, in the period of non-payment. *Quære*, if the absence of both payment and tender before loss was in such case unimportant? The insured, had he lived, might have allowed the policy to lapse. In most of the other cases, if not in all, payment or tender was made before the death. See cases cited in the note above referred to. In *Dillard v. Manhattan Life Ins. Co.*, where the death occurred before tender, judgment was given for the company; though not on that ground. Compare also *Want v. Blunt*, 12 East, 183; *S. C.*, ante, vol. 2, p. 200 and note.

¹ *Ante*, vol. 2, p. 168.

² *Ib.* p. 748.

³ *Ib.* p. 709.

NEW YORK.

IRA D. FOWLER, administrator, *vs.* THE MUTUAL LIFE INSURANCE COMPANY.

(4 Lans. 202. Supreme Court, 1870.)

Suicide. Insanity.—In an action on a policy of life insurance containing a provision that if the insured “should die by his own hand” the contract should be void; *held*, that mere proof that the insured, who had committed suicide, was insane at the time, was insufficient to take the case out of the provision mentioned. The insanity must be of such a character as to render the insured wholly unconscious of the act.
The evidence of insanity in this case examined.

ACTION upon a policy containing a provision that if the insured “should die by his own hand” the insurance should be null and void. The rest of the case is stated in the opinion of the court.

J. McGuire, for the plaintiff.

L. Robinson, for the defendant.

Present: Miller, P. J., Hogeboom, and Parker, JJ.

MILLER, P. J. Upon the trial of this case at the circuit, it appeared in evidence that the intestate caused his own death by the use of a pistol, and that there were indications in the room which he occupied that he had also taken poison for the same purpose. There was also found at the time a letter in his handwriting, addressed to his brother, informing him that he had suffered for a long time with the thought of becoming insane in consequence of a disease with which he was afflicted, which he had endeavored to cure, but had finally given up all hope of doing so, and that he had endeavored to put an end to his sufferings that night by poison which he had carried for several days. There was evidence to show that the tendency of the disease with which he was afflicted was to produce a morbid mental state, one of the precursors of insanity; that the deceased was a Spiritualist; that for some days, and immediately preceding his death, he appeared to be a little excited; was absent-minded; and one witness testifies that he did not appear as cheerful or talk as much; that he seemed to stand in a sort of melancholy state, and appeared to have a little fit of the blues. With the exception of

the foregoing facts, there was no direct evidence of mental aberration or insanity.

It is claimed by the plaintiff's counsel that the court erred in its rulings upon the trial, and that the case, in any point of view, was one which should have been submitted to the consideration of the jury. In support of this position it is urged that the question is, not whether the party was sane or insane, but whether the act of self-destruction was a criminal, intentional, voluntary act, designed to take life, and the party was, at the precise time, competent to realize the consequences of the means employed to take life. This is, undoubtedly, true; and the act itself must be deliberate, entirely voluntary, and such as evinces knowledge of its nature and character, and that the consequences to arise from it were fully understood. In the case at bar, the testimony did not show any direct manifestation of previous insanity of a positive character; and, unless the suicidal act itself may be considered as evidence of insanity, there were no facts presented which warrant the conclusion that the deceased was insane, and that his death by his own hand was not a premeditated act, which he fully appreciated and comprehended. The letter which he penned before the fatal deed was perpetrated bears evidence of coolness and deliberation; and, if it is to be interpreted as written, rebuts any presumption that he acted from a sudden insane impulse. He apparently knew the nature of the act he was determined to do, and in advance gave a reason for having perpetrated it.

None of the cases hold that insanity alone excuses the taking of life by the insured. Something more is required; and the courts hold that if the party is insane, it must be to such an extent as to render him wholly unconscious of the act, to entitle his representatives to recover upon the policy. The leading and only case in this State, where the question has arisen, is that of *Breasted v. The Farmers' Loan and Trust Company*, first reported in 4 Hill, 73,¹ where, upon demurrer to the plaintiff's replication to the plea of the defendant that the deceased committed suicide by drowning, it was held that, in an action upon the policy, the underwriters would be liable, though it appeared that the assured drowned himself, provided the act was done in

¹ *Ante*, vol. 1, pp. 341, 343.

a fit of insanity. The court said: "The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power." The case subsequently appears in 4 Seld. 299, upon an appeal from a judgment rendered by referees in favor of the plaintiff. The referees found that the assured threw himself into the river while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and wrong; and the court held that the self-destruction of the insured, under such circumstances, was not within the provisions of the policy.

It will be seen that there is a manifest difference between the case cited and the one now considered. It is, I think, fairly inferrible from the finding in *Breasted v. The Farmers' Loan and Trust Company*, (*supra*,) that the evidence of insanity was clear and indisputable, and that the testimony did not establish that the act was a voluntary one, committed while entirely conscious of its real character. The judgment was sustained, upon the ground that it did not appear that the killing was voluntary; which widely differs from a case where there is evidence of premeditation.

In *Borradaile v. Hunter*, (44 Com. Law Rep. 335,) ¹ the assured threw himself from the parapet of Vauxhall Bridge into the river Thames, and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying proviso to acts of felonious suicide. Erskine, J., says, in reference to the interpretation of the words employed, which are of the same import as those employed in the policy upon which this action is founded, "That the only qualification that a liberal interpretation of the words with reference to the nature of the contract requires is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and

¹ *Ante*, vol. 2, p. 280.

having at the time a purpose and intention to cause his death, by that act." There was nothing in the case last cited to indicate premeditation or an understanding of the nature and consequences of the act, except the act itself; yet it being voluntary, although done by a party incapable of distinguishing between right and wrong, the verdict was held to be erroneous.

In *Clift v. Schwabe*, (54 Eng. Com. Law R. 437,) ¹ the judge upon the trial directed the jury that, in order to find the issue for the defendants, it was necessary that they should be satisfied that the deceased died by his own voluntary act; being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent. The court held that this was erroneous, for that the terms of the policy included all acts of voluntary self-destruction, and, therefore, that if the deceased voluntarily killed himself, it was immaterial whether he was or was not a responsible moral agent. The case of *Dean v. Am. Insurance Company* (4 Allen, 96) ² sustains the same doctrine.

In view of the cases cited, the real question to be determined is, whether there was anything for the jury to decide as to the death of the deceased being voluntary, intentional, and designed. I think that there was no evidence for the consideration of the jury on this subject, and that the evidence would not have been sufficient to have warranted a verdict in favor of the plaintiff, even if the case had been left to the jury. There was no proof of insanity, except what might be inferred from the suicide itself. And even although, as was testified, the tendency to a morbid mental state is one of the precursors of insanity, yet the facts proved do not show that, in the case of the deceased, he had passed the line when reason had entirely lost its sway, and his self-destruction was an involuntary act beyond his control. But if insane, the letter which he penned, when on the point of taking the fatal step, contains intrinsic and positive testimony that he was laboring under no delusion as to the physical consequences of the act he was about to commit. He avows his intention and states his reason for the act. It is difficult to see how any question can be made as to the act being voluntary and wilful, for the purpose of destroying life. To arrive at such a

¹ *Ante*, vol. 2, p. 312.

² *Ante*, vol. 1, p. 195.

Rhodes v. The Railway Passenger Assurance Company of Hartford.

conclusion, the written statement of the deceased must be disregarded, and the fact must be established that he was insane. Under the circumstances, I am at a loss to see how this can be done, and am of the opinion that there was no question of fact for the jury to pass upon.

If the court was right in the rulings made as to this branch of the case, then the other questions raised are not important. The motion for a new trial must be denied, with costs, and judgment rendered upon the verdict. *Motion denied.*

See note to *Borradaile v. Hunter*, ante, vol. 2, p. 303.

WILLIAM B. RHODES, respondent, vs. THE RAILWAY PASSENGER ASSURANCE CO. OF HARTFORD, appellant.

(5 Lans. 71. Supreme Court, June, 1871.)

Accident insurance. Parol agreement to insure. — The plaintiff being about to take the cars in haste, gave the defendant's agent a sum of money as premium for one day's insurance against accident; the agent agreeing to issue policies at once. *Held*, that in case of an accident the company were liable though no policies were in fact issued; there being no limitation upon the power of the agent concerning the issuance of policies.

The intemperance of the assured, subsequent to the injury, is no defence to the company.

Subsequent injuries. — A clause requiring full particulars of the accident *held* not to require a disclosure of injuries happening subsequently to the injury alleged to be covered by the policy. *Held*, also, that if the original injury was insufficient alone to disable the insured, the company will not be liable though subsequent injuries happen of such a nature as to aggravate the first injury, and thereby to disable the insured.

ACTION for a personal injury. The plaintiff and his wife being about to take the cars in haste, the former gave one French, the defendant's agent, the sum of fifty cents, as premium on policies of insurance against accident for the two; the agent thereupon agreeing to issue the policies as soon as possible. The plaintiff received an accidental injury within the time covered by the policy, to wit, a sprain of the knee; which, however, was not of itself sufficient to disable him. Subsequently this injury was greatly aggravated by another accident, and the plaintiff was thereby disabled from performing work. French in the mean time was requested to deliver the policies, but refused.

One of the conditions of the company's policies required full particulars of the accident and injury, without suppression of any material fact. Proofs of the injury were duly sent, but they

Rhodes v. The Railway Passenger Assurance Company of Hartford.

contained no notice of the second injury. The case was tried before a referee, who gave judgment in favor of the plaintiff. Other facts appear in the opinion.

Davie & Payne, for the appellants.

Wright & Manning, for the respondent.

Present: Mullin, P. J., Johnson, and Talcott, JJ.

MULLIN, P. J. To have made the insurance of any value to the plaintiff, it must have taken effect on the 2d September, the day the application was made and the money paid. The agent received the money, and promised to make out a policy immediately. This arrangement the agent had power to make. Failing to make out and deliver the policy, the defendant must be liable either on the agent's agreement to insure, or upon his agreement to issue a policy. The measure of damages would be the same in both forms of action. *Lightbody v. North Am. Ins. Co.* 23 Wend. 18-25.

In the absence of any statutory provision requiring contracts of insurance to be in writing, they may be by parol. *Commercial Mut. M. Ins. Co. v. The Union M. Ins. Co.* 19 How. U. S. Rep. 318. It does not appear that the laws of Connecticut contain any provision prescribing the form or manner of making contracts of insurance in that State. The laws of this State contain no such regulation. It follows, therefore, that the defendant might have entered into a valid parol contract to insure the plaintiff, and, if so, its lawfully constituted general agent, in the absence of any limitations on his power, might also thus insure.

The only evidence of any limitations in the case is, that there was sent to him a book containing blank policies signed by the president of the defendant. It was doubtless the intention that those blanks should be filled and delivered to the persons insuring, and that the instrument thus filled should be the evidence of the contract. But the delivery of the policies in blank with such an intention does not necessarily operate as a limitation of his powers. He obviously had authority to bind the company on receipt of the established rate of premium to the extent set forth in the policy, whether a policy was in fact issued or not.

If by any accident the book of blanks had been destroyed, and yet the agent had continued to receive premiums, promising thereafter to deliver policies properly filled up, it would not be

pretended that the company was not bound, unless he was permitted to bind the company only by a written or printed policy.

In *Angell on Fire and Life Insurance*, § 33, it is said: "In commercial towns actions on mere agreements to insure, whether against fire or perils of the sea, are not uncommon; and they are always sustained whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be done but to deliver the policy. *Kelly v. Commonwealth Ins. Co.* 10 Bosw. 82. In case of such an agreement, and refusal to deliver a policy, equity would give relief either by compelling the insurance company to deliver the policy, or decree the payment of the money. *Angell*, § 34; *Perkins v. Washington Ins. Co.* 4 Cowen, 645.

That the plaintiff was equitably entitled to a policy cannot be seriously questioned. Indeed, a court of equity would decree the payment of the amount agreed to be paid, if the plaintiff could prove performance of the conditions in the established form of policy.

The conditions subsequent, which the plaintiff was bound to perform in order to render the defendant liable, were to furnish proofs of the accident and injury within seven months of the accident, without suppression of any material facts.

The proofs were furnished within the seven months after the injury, and no objection is raised to them on the appellant's points, except that plaintiff omitted to disclose the fact that he commenced work in January; was discharged in a few days thereafter by his employer because of intemperance, and that he concealed the injury to his knee by reason of his foot being caught in the stairs on or about the eighteenth September. The intemperance of the plaintiff was wholly immaterial in the case, unless it contributed in some degree to cause the injury. No such thing is pretended. And the intemperance spoken of by the witnesses occurred after the injury. If it existed before, it is not proved.

The injury to the knee on or about the eighteenth September was not disclosed. It was a fact quite important for the defendant to know. But the suppression of an important fact is not enough; it must be the suppression of a fact relating to the accident or injury, and the accident or injury to which the proofs must relate, and as to which there must be no concealment, is the

Rhodes v. The Railway Passenger Assurance Company of Hartford.

one insured against, and which in this case happened on the second September. There was no concealment as to that.

The referee finds the total inability to labor continued from the eighteenth September until the middle of March. He obviously did not consider the attempt made by the plaintiff to work on the first day of January, as any evidence of his ability to do so. On the contrary, the facts found show that he was in truth unable to labor.

If it should be held that an action could not be maintained upon the contract as one of insurance, it could be maintained on the facts stated in the complaint on the contract to prepare and deliver to him a policy of insurance. It was held in *Lightbody v. North Am. Ins. Co.* that such an action could be maintained, and the damages would be the same as in an action on the policy. In that case the defendant's agent had agreed to take the risk, and the premium was paid to him, and he gave a receipt therefor promising to deliver the policy in a few days. He refused on demand to deliver it, and the defendant denied his agency and its liability on his contract.

I entertain no doubt but that the plaintiff could maintain an action against the defendant for the recovery of such damages as were recoverable under the policy, by reason of injuries sustained by him during the twenty-four hours immediately succeeding the application to defendant's agent to insure him.

The important question in the case is, whether any damages have been sustained for which the defendant is liable within the true intent and meaning of the policy.

I take it for granted that the plaintiff can recover only according to the terms and conditions of the policy, whether his action is on the contract of insurance or on the agreement to deliver a policy.

By the policy the defendant is liable only for "loss of time from the time of the accident and injury, which totally disabled and prevented from all kinds of business, by reason of bodily injuries effected during the term of the policy through violent or accidental means."

Has there ever been a total disability resulting from the injury insured against?

While the policy is to be liberally construed, its provisions cannot be disregarded. To make the defendant liable, total disabili-

Welts v. The Connecticut Mutual Life Insurance Company.

ity to labor must be shown. The referee finds that there was total disability from the eighteenth of September, but he also finds that plaintiff sustained on or about the eighteenth an additional injury, and it was not until after that additional injury that the disability became total. While suffering from the injury resulting from the accident insured against, the disability was partial only, and it is not shown that, from the nature of the injury, it would, at any future time, render plaintiff totally incapable of labor.

Had it appeared that, from the nature of the injury, the plaintiff would, at some time, become incapable of labor, by reason of it, it might be that the happening of a second injury would not deprive the plaintiff of the right to recover the damage sustained by him; but when it is shown that, for sixteen days after the injury, the plaintiff was able to labor, and that before he became incapable, another and additional injury was sustained, it is impossible to hold that he ever became totally incapable from the injury insured against.

The judgment of the referee must be reversed and a new trial granted; costs to abide the event. *Judgment reversed.*

DELILAH WELTS, respondent, *vs.* THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, appellant.

(48 N. Y. 34. Court of Appeals, September, 1871.)

Military service. — A provision in a policy of life insurance, forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering into it to do duty as a combatant. An employment therefore, by military authorities, in constructing a railroad bridge, is not within the prohibitions of the policy, and does not invalidate it.

Permits. War or rebellion. — At the time of issuing the policy in question, defendant, for a further premium of fifty dollars, by a written instrument gave the assured permission to go south of the thirty-sixth degree of north latitude and reside there during the term of one year; provided, and with the understanding and agreement, that the policy did not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces. While engaged in building a railroad bridge, under the direction of the military authorities of the United States, about thirty miles in the rear of the Union army, and still further from the Confederate forces, the assured was shot and killed by two of a party of men not in uniform, who robbed the men employed upon the work and residents near. *Held*, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit; and that defendant was liable.

Welts v. The Connecticut Mutual Life Insurance Company.

APPEAL from judgment of the general term of the supreme court in the Seventh Judicial District, entered on a verdict for the plaintiff, given by direction of the court at circuit. Exceptions heard at the general term in the first instance. (Reported below, 46 Barb. 412; *S. C.*, *ante*, vol. 1, p. 581.)

The action is to recover the sum of \$5,000 insured by the defendant, by a policy on the life of Philip J. Welts, payable to the plaintiff, his wife, in ninety days after notice and proof of his death, dated September, 1864.

The policy contains a proviso that in case the said Philip shall, without the consent of the company, previously obtained and indorsed upon the policy, visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, or shall, without such previous consent thus indorsed, enter into any military or naval service whatsoever, (the militia not in actual service excepted,) the said policy shall be void, null, and of no effect. At the time of issuing the policy, the defendants, in consideration of the further premium of fifty dollars, by a written instrument gave the said Philip permission to go south of the thirty-sixth degree of north latitude, and reside there or return, during the term of one year, without prejudice to the policy; provided, and the permission was given with the understanding and agreement, that the said Philip was not insured by said policy against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be.

The defendants allege by their answer:—

1st. That the said Philip entered the military service of the United States, and lost his life while in such service.

2d. That he lost his life by the casualties or consequences of war or rebellion, or from belligerent forces, within the proviso or exception of the permission given.

The said Philip was killed by pistol shots at Cedar Hill, in the northern part of the State of Tennessee, on the 31st of October, 1864. The preliminary proof of his death was furnished to the company in due form. At the time of his death he was engaged as superintendent in charge of constructing bridges on the Edgefield and Kentucky Railroad, in the employment of the government of the United States, having about fifteen laborers and mechanics assisting in the business under his superintendence. The

Welts v. The Connecticut Mutual Life Insurance Company.

railroad was under the direction of, and used, or to be used, by the military authorities of the United States for military purposes. He was so employed about thirty miles north and in the rear of the Union army commanded by General Thomas, and eighteen miles south of the northern line of the State. The forces of the rebellion were still farther from the party of laborers, and south of the Union army. Welts, and the laborers and mechanics whom he was superintending, had no arms, wore no uniforms, and there were no soldiers at the place, nor anywhere nearer than the Union lines at Nashville.

On the afternoon of October 31, 1864, four men on horseback rode up and inquired if there was any one there who wore a federal uniform. They inquired for the foreman. Mr. Welts replied that he was the man, and they ordered him to come to them, and he did not obey. Two of the mounted men fired their pistols at Welts, shooting and wounding him four times, so that he died the next day. The four then robbed the other men employed there, and also one or two southern men who resided near, and in about ten minutes rode away, without attempting to injure any other person, or making any prisoners, or disturbing the railroad, or the work under construction. The four wore no arms, except navy revolvers, and no military trappings upon their persons or horses, except that two of them wore federal military overcoats, it being common for persons, although not in the Union military service, to wear such garments. They made no statement as to themselves, and it did not appear that they belonged to the Confederate army, or acted under Confederate authority.

At the close of the evidence, the judge directed a verdict for the plaintiff for the amount claimed and interest, to which the counsel for the defendant excepted. The exceptions were heard, in the first instance, at the general term, and, being there overruled, judgment was entered on the verdict for the plaintiff.

George T. Spencer, for appellant.

George B. Bradley, for respondent.

LEONARD, C. The policy enjoined it upon Welts that he was not to go south of the thirty-sixth degree of north latitude in the United States, and not to enter into any military or naval service whatsoever, without the consent of the company, indorsed in writing upon the policy, under the penalty of rendering the contract

Welts v. The Connecticut Mutual Life Insurance Company.

void. At the same time with the issuing of the policy, the company, for a further consideration, granted their written permission to go south of the line of latitude mentioned, for the term of one year, and added to the consent as a proviso or condition, that it was given with the understanding and agreement, that Welts was not insured by the policy against death from any of the "casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be."

The permission which abrogates for one year the restriction against going south of the thirty-sixth degree of latitude at certain seasons, imposes a new limitation upon the liability of the company, in case of death from certain casualties or consequences of war, rebellion, or belligerent forces, which were more to be apprehended in that portion of the United States, at the time the policy was issued, south of the thirty-sixth degree of latitude, and in the vicinity of that line, than the dangers from climatic causes. For the consideration of fifty dollars, the company took the hazard of the climate, and the assured took the risk of the casualties or consequences mentioned.

There is no evidence that the deceased availed himself of the permission to go south of the latitude mentioned; and, at the time of his death, he was clearly north of it according to approved maps. If there was sufficient evidence, then, to go to the jury, tending to prove that the deceased entered the military service of the United States, or that his death happened from any of the casualties or consequences mentioned in the proviso attached to the written permission to go south, the direction to render a verdict for the plaintiff was erroneous, and the defendant's exception well taken.

The deceased held no office of a military character, and there is no evidence that he was ever enlisted or enrolled as a private. I am not much experienced in military affairs; but it is generally understood that there is a record of the entry of both officers and privates into the military service. There is, clearly, no evidence of this character.

There is some evidence that he, as well as the mechanics and laborers under his superintendence, were at work by the month. That does not indicate military obligation. The fact that he and the others were paid by the military paymaster proves nothing, on the question whether the deceased was in the military service.

Such payment might be so made without having entered that service. His employment was not belligerent. On the contrary, the most decided non-resistant might consistently do the same work. It is urged that the railroads were under a military director, and were used for military purposes exclusively. The roads could not be so used until bridges were constructed ; and I am unable to perceive that a civilian might not engage in their construction without losing his standing as a non-combatant. Suppose that the military director of railroads employed the deceased, and that he was subject to his authority while so employed ; it does not necessarily follow that he had entered the military service. Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense, as most advantageous to the assured, as well as all other provisions therein. The company frame the policy and choose the language. If there is anything uncertain, it is the right of the assured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants.

There is no evidence that the widow is entitled to a pension, as would be the case if her husband had perished in the military service of the United States during the rebellion. There is, in my opinion, an entire absence of any evidence that the deceased was in any military service according to the meaning of the policy. Did he lose his life by the casualties or consequences of war, rebellion, or from belligerent forces ? Certainly there is no evidence that this party of four, who came without any of the insignia of war, armed with revolvers only, and doing nothing for the service of the public or Confederate cause, but confining their operations to robberies for their personal advantage, and to the murder of an unarmed man, not in the dress of a federal soldier, constituted a belligerent force, or any part of such force. The war or rebellion may be a remote cause of the death, as it was the cause of disorder and lawlessness ; but the proximate cause is murder and highway robbery.

It would be a very unnatural and forced construction that would relieve the defendants from liability, by holding that the four robbers and assassins who murdered Philip J. Welts, and robbed the mechanics and laborers whose work he was superintending, were acting under the authority of the Confederate States.

Hutchings v. Miner.

Had the defendants intended to attach such a meaning, the provision would have been directly for exemption from liability for death by violence. The language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some *de facto* government, at least. No evidence was produced tending to bring the defendant's case within any such limit.

There were no facts for the consideration of the jury.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

PRISCILLA C. HUTCHINGS, appellant, *vs.* JULIUS T. MINER,
respondent.

(46 N. Y. 456. Court of Appeals, November, 1871.)

Revocation of policy. Consideration. — Where a policy of insurance upon the life of one is made payable to and held by another, but is so held in whole or in part for the benefit of the insured, or of whomsoever he shall designate, the insured has the power to revoke *pro tanto* the authority of the holder, or to change the conditions of the holding, and to annex to it new conditions. And if the insured suffers it to remain in the possession of the holder, upon his promising to pay a debt of the insured out of the avails of the policy when collected, this is a valid consideration for the promise; and the creditor for whose benefit it was made, although having no knowledge of it at the time, can affirm and enforce it. And if the insured made the request to and laid the duty upon the holder, and he, though making no direct promise, did not decline, or offer to give up the policy or the interest of the insured therein, but retains it and receives the whole amount, his consent is to be presumed.

APPEAL from a judgment of the general term of the supreme court, in the Eighth Judicial District, entered upon an order denying a motion for a new trial and directing judgment in favor of the defendant.

The complaint alleged that the plaintiff lent to Henry B. Burt \$518.60, to secure the payment of which Burt procured a policy of insurance on his life for \$1,000, payable to the defendant. That on the day of his death Burt directed the defendant to pay the plaintiff so much of the insurance money as would be sufficient to pay her debt against Burt. That defendant then promised Burt that he would so pay the plaintiff. That Burt died on the 8th day of January, 1868. That the insurance money was afterwards paid to the defendant, of whom the plaintiff demanded the payment of her said debt, which was refused.

The answer admits that defendant received of Burt the policy

Hutchings v. Miner.

of insurance as alleged in the complaint, and that he received of the insurance company on said policy the sum of about \$900, and denies every other fact in the complaint contained.

The plaintiff on the trial of the cause gave evidence proving that she lent to Burt the sum of \$518.60 at the time and in the manner stated in the complaint; and that after the defendant had received the money on the policy she demanded of him that he should pay her said debt, which he refused to do. And she gave evidence tending to prove that when Burt delivered said policy to the defendant he informed him (defendant) that the policy was for the purpose of securing and paying such debts as the one he owed the plaintiff; and that Burt, in his last sickness, the last day of his life, directed the defendant to pay the plaintiff's demand out of the insurance money, and that defendant promised Burt that he would so pay her.

The court nonsuited the plaintiff.

B. H. Austin, Jr., for appellant.

J. C. Strong, for respondent.

FOLGER, J. This case was tried at circuit by the court with a jury. The learned justice who presided ruled that the plaintiff should be nonsuited; and it is on the exception to that ruling that the case comes before us. We must assume then that the jury would have found in favor of the plaintiff every fact which the proofs given will legitimately establish.

The policy of life insurance by its terms was payable to the defendant, and had, from a short time after it was issued to the intestate Burt, been in the possession of the defendant. But testimony was given without objection which tended to show that, notwithstanding this, it was held by the defendant on some agreement between him and Burt, made at or near the time of issuing, not alone for the benefit of the defendant, but for the use of Burt as well. There was also testimony given which tended to show that it was taken out to meet, from the avails of it, any pecuniary obligations incurred by Burt without their being defined or specified as to amount, or kind, or owner, further than that they were such as this of the plaintiff; and that Burt had borrowed small sums of the defendant. And the testimony tended to show that the defendant was also charged by Burt with the duty of expending some of the avails upon Burt's lot in the graveyard. Had the case been given to the jury, it would have

been for them to have determined just what the conditions were under which the policy was made payable to the defendant, and was held by him.

If the jury had found that the conditions were such that the defendant held it, in whole or in part, for the benefit of Burt, or for the benefit of whomsoever Burt should designate, it was in the power of Burt to revoke *pro tanto* the authority given by him to the defendant, and to change to such extent the conditions of his holding, and to annex to his holding new conditions, and then to name to whom a portion of the avails of it should be paid. We are not to say that they might not have so found. Had the jury gone so far, then there was testimony tending to show that Burt, while he had such power to recall it from the defendant, and to make of it other disposition, did nevertheless permit it to remain in the possession of the defendant, on his promise to Burt to pay from the avails of it enough to satisfy to the plaintiff her unpaid note of \$500, made to her by Burt. And this would be in legal effect the same as if Burt had then originally committed it to the defendant for that purpose, on receiving from him that promise. *Williams v. Fitch*, 18 N. Y. 546. It is true that the testimony of the witness, Mr. Box, who alone speaks to an express promise, is not positive as to it, and gives only his best recollection. But this a jury may consider and ponder as they see fit.

But if the jury from his testimony would not have found an express promise, there was other from which they could have found that Burt made the request to or laid the duty upon the defendant that out of the avails of the policy he should thus pay the plaintiff; that having the policy in his hands, subject to the power in Burt to recall it or an interest in it therefrom, and in other hands to devote it to the object of his intense desire, the defendant listened to the request, did not decline to accede to and carry it out, did not offer to give up the policy or any interest in it, but retained it and received upon it nearly the whole amount of it. From this the jury could presume that he assented to the terms on which it was left, in effect put, in his possession and control. *Berly v. Taylor*, 5 Hill, 577; *Hall v. Marston*, 17 Mass. 575. Such conduct on his part, if found by the jury, was equivalent to an express promise made to the plaintiff. *Weston v. Barker*, 12 Johns. 276.

Had the jury gone thus far, the defendant would be found by them coming into the possession of a fund under an agreement with Burt, based upon a valid consideration, to hold the same until available, and when availed of, to pay over the same for the benefit of the plaintiff. She could then, though the agreement was made without her knowledge at the time of its making, affirm it and enforce it against him. Com. Dig. Action on Case, Asst. B. 15; *Neilson v. Blight*, 1 Johns. Cas. 205, cited in *Cumberland v. Codrington*, 3 Johns. Ch. 261; *Weston v. Barker*, *supra*. And this she could do in an action at law. Cases last cited.

This case would then fall within the principle laid down in *Lawrence v. Fox*, 20 N. Y. 268, and recognized and approved in many cases since that was decided: *Secor v. Lord*, 3 Keyes, 525; *Van Schaick v. Third Ave. R. R.* 38 N. Y. 346; *Burr v. Beers*, 24 N. Y. 178; *Freeman v. Auld*, 44 N. Y. 55; to wit, when A for a valid consideration promises B to pay C, C may maintain an action on the promise, though not privy to the consideration.¹

The testimony tended, too, to make a case such as appears in *Williams v. Fitch*, *supra*. Here, as there, the defendant was in possession of property of an owner which might have been recalled from him and other disposition made of it. In consideration that it was not so recalled and otherwise disposed of, he promised to the owner that he would hold it for the benefit of another. Here, as there, the defendant held the funds in question upon a trust, for the benefit of that other, who was consequently entitled to recover them. In that case an action at law for money had and received to the use of the plaintiff was sustained.

Of course, all that we have said is subject to the qualification that the jury would have found from the testimony a state of facts such as we have assumed they might have done. If the defendant had been put to his defence, the testimony might have been materially varied.

If the jury had thus viewed the testimony, they would have found a valid agreement *inter vivos*, by which the owner of a contract set aside a portion of the probable avails of it to the payment of a lawful debt against him. It was in no sense a testamentary disposition, nor a *donatio mortis causa*. Nor does a

¹ This rule has been materially modified. See *Mellen v. Whipple*, 1 Gray, 317, 322; *Exchange Bank v. Rice*, 107 Mass. 37, 42.

The National Life Insurance Company v. Minch.

question arise under the statute of frauds. *Farley v. Cleveland*, 4 Cowen, 432. Nor would any rights of administrators of the owner's estate intervene between the plaintiff and the fund. Nor would the action of the defendant in fulfilling his agreement, by collecting and receiving the avails of the policy and paying to the plaintiff the amount of her note, be hampered necessarily by any question as to the proper disposition of what remained after she was paid. The testimony tended to show that at first Burt was desirous that all the indebtedness against him, or more than that of the plaintiff, should be paid by the defendant from the avails of the policy; but that, on perceiving their insufficiency therefor, his mind fixed upon the payment of the note of the plaintiff as a prime purpose. Now whatever the claims of the defendant against Burt, for which he could insist that the policy was pledged, so far as appears from the testimony they were not so large as that the payment of them would not leave of the fund a sum over \$500. It was then, when the defendant was paid the sum of \$900 upon the policy, as if there were set apart in his hands enough of that to pay the plaintiff's note, to which no one else, so far as the testimony tends to show, had any claim. And if, after that amount was set apart, there was a residue, it was held by him subject to any legal claim of Burt's creditors or personal representatives.

The judgment of the court below should be reversed, and a new trial ordered, with costs to abide the event of the action. All concur. *Judgment reversed.*

THE NATIONAL LIFE INSURANCE CO. vs. PHILIP MINCH,
administrator of Anna C. Minch.

(6 Lans. 100. Supreme Court, November, 1871.)

Fraud. Conspiracy. Recovery of money paid by company.—The plaintiff having paid the amount of a life insurance policy to the defendant, brought an action to recover back the same, alleging that the insurance had been effected upon a fraudulent combination and confederacy between the plaintiff's medical examiner, the defendant, and the insured. *Held*, that to sustain the complaint it was necessary to establish knowledge of the alleged combination and conspiracy on the part of the insured. DANIELS, J., dissenting.

ACTION to recover the amount of a policy paid the defendant's

intestate upon an insurance on her life. The facts are stated in the opinion of the court.

J. E. Lowery, for the plaintiff.

J. M. Carroll, for the defendant.

Present : Miller, P. J., Parker, and Daniels, JJ.

By the court, MILLER, P. J. At the close of the trial of this action at the circuit court, the judge made several rulings, to which exceptions were taken before directing a nonsuit; and among other things, he ruled that there must be proof of a combination, conspiracy, or understanding to defraud the company to which Mrs. Minch was a party, and that there was not sufficient evidence from which the jury could find such conspiracy. The plaintiff's counsel excepted to this decision; and if the judge committed no error in thus holding, then the plaintiff was properly nonsuited upon this ground alone, and the action could not be maintained.

I think that the judge was clearly right in the ruling which he made, and as one good ground was enough to sustain a nonsuit, the other rulings are of no consequence.

The action was predicated upon an alleged fraudulent combination and confederacy between Davison Potter, the medical examiner of the plaintiff, the defendant, and his wife, Mrs. Minch. It was alleged and claimed, upon the trial, that the parties named had combined and confederated together to defraud the plaintiff; and that, with the intent to deceive, cheat, and defraud the plaintiff, they made the false and fraudulent representations stated in the complaint, by means of which the policy of insurance was obtained on the life of Mrs. Minch.

Now, it is quite plain that if there was no evidence that Mrs. Minch had any knowledge of any combination and conspiracy, or of any intent to cheat and defraud the plaintiff, then there is an utter failure to establish the cause of action alleged, and no case is made out which entitles the plaintiff to recover. So far as relates to Mrs. Minch, at least, the proof fails to establish the allegations made, and as she was not a party to the combination the action must fall to the ground.

There is no evidence in the case which establishes that the parties, when together, ever exchanged a word between themselves on the subject. It appears that the defendant applied to Adams, the agent of the company, for the policy of insurance.

The National Life Insurance Company v. Minch.

Adams filled up the application, and took the answers to the questions propounded to Mrs. Minch, the applicant, from her husband, at his (Adams's) office, and sent the application by the husband to Mrs. Minch. It was returned to Adams by Mr. Minch, with a mark, purporting to be Mrs. Minch's mark, attached at the end of it. Adams considered it necessary that it should be witnessed, and about one week afterward he went to Mrs. Minch, saw her personally, and asked if she had affixed her mark to the application. She replied that she had, and he then signed his name as a witness. He did not interrogate her in regard to it. The proof also shows that Mrs. Minch was a German, could not read or write English, and spoke the English language very imperfectly. The application was not made to her, she did not know the contents of it, and they were not stated to her; that Dr. Potter, at the request of Adams, made a careful examination of the deceased. He had no conversation with Mr. Minch in relation to the insurance of his wife's life before the policy was issued, nor with Mrs. Minch, except upon the examination, and he testifies that she could only talk sufficiently to get along with the examination; that he could not talk with her, as she talked German, and he could not carry on a general conversation with her perfectly and accurately. He did not know the contents of the application, never having seen it until the trial. Nor is there any evidence that either Minch or his wife ever saw or knew of the contents of Dr. Potter's certificate.

It is manifest, from the testimony, that Mrs. Minch was in no way a party with her husband and Potter to any fraudulent combination. To constitute a fraudulent conspiracy against a party, it must be proved that the person charged had knowledge of its existence and the purpose for which it was designed. Such knowledge is wanting in this case, and there is not a particle of proof that Mrs. Minch knew anything in regard to it. So, also, to make a party liable for fraudulent representations, they must be known to be such by the party making them, and such party cannot know them to be false without having knowledge that they were made and what they actually were.

As Mrs. Minch signed, or rather affixed her mark to, the application, she would, perhaps, be bound by the representations which it contained, as warranties, without knowing what they were, but she could not be affected by them as fraudulent, without knowledge.

Thompson v. The American Tontine Life and Savings Insurance Company.

As she had no knowledge what representations were actually made upon the application, they were not fraudulent as to her, although they were false.

Even if the representations made by Dr. Potter's certificate of examination were false and fraudulent, as the deceased had no knowledge of its contents, she cannot be responsible for it, or affected by them as fraudulent. She was not responsible for any fraudulent representations he might make as the medical examiner of the company without her knowledge or consent.

As the judge was right in his ruling upon the point discussed, he properly refused to submit the case to the jury upon any of the propositions made by the plaintiff's counsel, and properly refused the requests made; nor was there any error in the admission or rejection of evidence. The nonsuit was right, and judgment must be ordered for the defendant upon the verdict.

PARKER, J., concurred; DANIELS, J., dissented.

Ordered accordingly.

Note. — The difficulty in the plaintiff's case lay of course in the form of the complaint. If the ground of action had been alleged to be the false representations of the insured, it would not have been necessary to prove that they had been made with knowledge of their untruth. See *Campbell v. New England Life Ins. Co.* 98 Mass. 381; *S. C.*, ante, vol. 1, p. 229. But if the company relied solely upon the statement of their medical examiner, *quære* as to their right of recovery. See *Hogle v. Guardian Life Ins. Co.* 4 Abb. Pr. N. S. 346; *S. C.*, ante, vol. 1, p. 597; *Wheelton v. Hardisty*, 8 El. & B. 232; *S. C.*, ante, vol. 2, p. 447; *Rawlins v. Desborough*, 2 Moody & R. 328; *S. C.*, ante, vol. 2, p. 271, and note.

MARY JANE THOMPSON, respondent, *vs.* THE AMERICAN TONTINE LIFE AND SAVINGS INSURANCE Co., appellant.

(46 N. Y. 674. Court of Appeals, December, 1871.)

Acceptance of policy. Contract. — An acceptance by a wife from her husband of a policy of insurance upon his life, procured by him for her benefit, without previous authority from her, is a sufficient adoption of his act, and constitutes a valid contract between her and the company issuing the policy.

C. F. T., general agent of defendant, appointed D. W. T. and his partner sub-agents, and on the same day received the application of D. W. T. for a policy which was forwarded to defendant. At the same time, C. F. T. asked the sub-agents for a loan or advance, stating he needed it on his journey, and that they should charge it to the company on premiums to be collected thereafter. D. W. T. thereupon made the required advance. **Afterward**, the policy was received by D. W. T. by mail. *Held*, that the transaction

Thompson v. The American Tontine Life and Savings Insurance Company.

was not a loan to C. F. T. upon his individual credit, but an advance by the sub-agent to the general agent on account of premiums expected to be collected, including the premium on the policy in question, and was in effect a payment in advance of that premium, subject to the condition of the acceptance of the risk.

APPEAL from judgment of the general term of the supreme court in the Third Judicial District, affirming a judgment entered in favor of plaintiff upon the report of a referee.

The action was brought to recover the amount of a policy of insurance alleged to have been issued by defendant to plaintiff upon the life of her husband, Daniel W. Thompson. The facts sufficiently appear in the opinion.

John N. Whiting, for appellant.

RAPPALLO, J. The plaintiff was authorized, by statute, to cause the life of her husband to be insured for her use. But we held, in the case of *Baker v. The Union Mutual Life Ins. Co.* 43 N. Y. 283,¹ that, independently of the statute, the wife had an insurable interest in the life of her husband, and that an insurance procured by him for her benefit was good at common law.² The insurance in the present case was procured by the husband without previous authority from his wife, and by the terms of the policy she was the assured. But her subsequent acceptance of the policy from him was a sufficient adoption of his act to constitute a valid contract between her and the company, unless the objections that the premium was not paid, and that the policy was never duly delivered, can be sustained.

The court below found adversely to the defendant on both of these issues, and if there is any evidence to sustain these findings, they are conclusive.

No question is made but that the policy, duly executed, was sent by the defendant, by mail, to D. W. Thompson, and by him received and delivered to his wife, who retained it until after his death. It is contended, however, that he having been at the time an agent of the defendant, must be deemed to have received it in that capacity, and that he had no authority to deliver it to his wife, the assured, without payment of the premium, and that the evidence establishes that the premium was not paid. The question of delivery, therefore, depends upon the question of payment.

The policy contains a receipt for the premium, but this receipt

¹ *Ante*, vol. 2, p. 125.

² See note *ante*, p. 655.

Thompson v. The American Tontine Life and Savings Insurance Company.

is open to explanation. *Baker v. Union Mutual Ins. Co., supra.* The facts proved at the trial in respect to the payment of the premium were, that C. F. Thompson, general agent of the defendant, appointed D. W. Thompson and his copartner, Dix, as sub-agents, on the 14th of October, 1868, and on the same day received Thompson's application for the policy in question, which was, thereupon, forwarded to the defendant. At the same time, C. F. Thompson asked Thompson & Dix for a loan or advance of some money, stating that he needed it on his journey, and that it should be charged to the company on premiums, to be collected by Thompson & Dix thereafter. He also stated that he (C. F. Thompson) was in the habit of collecting money in that way. D. W. Thompson, thereupon, made the required advance. The amount of the advance does not appear. Ten days afterward the policy was received by D. W. Thompson, by mail.

No evidence was given, on the part of the defendant, for the purpose of showing that the transaction in question did not come to its knowledge before the sending of the policy, except the statement of the secretary, that he first heard of payments of premium by a report of Dix, dated January 9th, 1869. Nor was there any evidence that the acts of C. F. Thompson were out of the usual course of dealing, or beyond the scope of his actual authority as general agent. But the defendant relies upon the legal proposition, that the advance made by D. W. Thompson was, upon its face, a loan to C. F. Thompson individually, and that his instruction to charge it to the company, or to apply future premiums to its satisfaction, was manifestly beyond the scope of his powers as agent.

We think, however, that the dealing will bear the interpretation, that it was not a loan to C. F. Thompson on his individual credit, but an advance by the sub-agent to the general agent as such, on account of the premiums which the former expected to collect for the defendant, including the premium which would become payable on his wife's policy, in case the company should accept the application contemporaneously made for that policy. It is not necessary to examine the effect of the advance beyond that which it would have in respect to this particular premium. The authority of the general agent to receive premiums is not disputed, and it could hardly be said, especially in the absence of any evidence on the part of the defendant in respect to the pre-

Mallory v. The Travellers' Insurance Company.

cise limits of his authority, that they would be exceeded by his receiving the premium in advance at the time of the application for insurance, subject to the condition of the acceptance of the risk by the company. It seems to us, that in passing upon the question of fact the court below was authorized to infer from the evidence, that such was the intention and understanding of the parties, in respect to so much of the advance as was covered by the premium on the plaintiff's policy, and that thus viewed the evidence was sufficient to sustain the finding.

The judgment should be affirmed with costs. All concur.

Judgment affirmed.

ELLEN E. MALLORY, respondent, vs. THE TRAVELLERS' INSURANCE COMPANY, appellants.

(47 N. Y. 52. Court of Appeals, December, 1871.)

Accident insurance. Evidence. Insane person. Concealment. — Defendant issued an accident policy of insurance upon the life of M., who, prior to procuring the policy, had been a canvasser for applications for insurance with defendant. The president had directed him to be cautious, as the company did not wish to insure insane persons, &c. Some time prior to the issuing the policy M. had been insane; had been sent to an asylum, and discharged cured; and from that time forward had been sane. He did not disclose the fact of his former insanity upon applying for a policy, but stated there were no circumstances rendering him peculiarly liable to accident. *Held*, that the conversation with the president had no tendency to show a fraudulent concealment of material facts, and that it was not error in the court to charge, that the conversation had no bearing on the application. Also *held*, that the court was correct in charging that if the deceased did not conceal any facts which in his own mind were material in making the application, the policy was not void; no inquiries being made.

Death by accident. — By the terms of the policy the sum insured was to be paid if the insured "shall have sustained personal injury caused by any accident, . . . and such injuries shall occasion death," &c. *Held*, that if a wound received by deceased, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental and defendant liable.

presumption against suicide. — Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries or of a suicidal act of deceased, the presumption of law is against the latter.

APPEAL from judgment of the general term of the judicial district, affirming a judgment entered upon verdict in favor of plaintiff.

This action is brought upon an accident policy of insurance issued upon the life of W. S. Mallory for the sum of \$2,000, for the benefit of and made payable to plaintiff. By the policy the defendant agreed to pay the sum insured, "within ninety days

Mallory v. The Travellers' Insurance Company.

after sufficient proof that the insured, at any time within the term of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy and the conditions hereunto annexed, and such injuries shall occasion death within three months after the happening thereof." "And if the insured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of business, then on satisfactory proof of such injury, compensation shall be paid to him," &c. "Provided always that no claim shall be made under this policy by the said insured in respect of any injury, unless the same shall be caused by some outward and visible means, of which proof satisfactory to the company shall be furnished," &c. The facts pertinent to the questions discussed and disposed of appear in the opinion.

Reynolds & Ward, for appellants.

J. R. Allaben, for respondent.

GROVER, J. The question whether the plaintiff had an insurable interest in the life of the deceased does not arise in this case. The insurance was upon the life of W. S. Mallory. The policy was procured by him, and he paid the premium therefor, and made the loss payable to the plaintiff (his daughter) or legal representatives. This, in effect, was a policy procured by him upon his own life, and an assignment thereof to the plaintiff. *Grosvenor v. The Atlantic Fire Ins. Co.* 17 N. Y. 391; *Rawls v. American Mutual Ins. Co.* 27 N. Y. 282.¹ There was no error in denying the defendants' motion for a nonsuit. No ground for such motion was stated, and in such a case the well settled rule is, that there is no error committed by denying it, although there may be a defect in the plaintiff's proof, if the defect was such that it might have been supplied if pointed out upon the motion. But there was no such defect. The proof showed that the deceased had been staying at his brother's at Bridgeport, Conn., for about a week; that he left the house on Sunday, and was last seen alive on that day, walking toward a railroad bridge over a culvert, across a stream emptying into the Sound, where the waters of the Sound set, to some extent, into the land, and up the stream at high tide; that this bridge was used by pedestrians to cross the stream to a considerable extent; that the body of the

¹ *Ante*, vol. 1, p. 558.

deceased was found in the pond not far from the bridge a few days thereafter. The policy was one embracing cases only where the death was caused by an injury received from an accident. From the facts above (stated) it appeared either that the death was caused by such an injury or the suicidal act of the deceased ; but the presumption is against the latter. It is contrary to the general conduct of mankind ; it shows gross moral turpitude in a sane person. That it resulted from the former cause was to some extent rendered more probable by the wound upon the head of the deceased, and the break in the corresponding part of his hat. Although this wound might have been made after the deceased was in the water, or while falling in, yet it was for the jury to say how it was caused, and to determine its effect upon the question whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life.

The court did not err in charging the jury, that the conversation between the president of the company and the deceased had no bearing upon this particular application. It was proved that the deceased at the time of death was, and for some time previous to procuring the policy had been, a canvasser for applications for insurance with the defendant. That in an interview with the president, the deceased remarked that he could procure a great number of applications in Newark ; to which the president in substance replied, that he must be cautious, as the company did not wish to insure insane persons, or persons of habits of intoxication. This evidence was relied upon by the defendant to avoid the policy, in connection with the facts proved, that the deceased, twenty years before making the application, had a severe fever, during which he was more or less insane, but that after recovering therefrom he was sane until three or four years before that time, when he was insane, from what cause did not appear, and was placed for about three months in a retreat for such persons, when he was discharged cured therefrom, from which time to his death he more or less attended to business, was sane, or at most the evidence of a want of sanity was so slight during any portion of this period as hardly warranted the submission of any question thereon to the jury. That the deceased did not state to the company upon making application for the policy that he ever had been insane, but did state there were no circumstances which rendered him peculiarly liable to accident. This general conver-

sation with the president some time before the application had no tendency to show a fraudulent concealment of material facts upon making the application. There was no evidence tending to show that he was then insane, or that he had been for some time before, and this conversation did not convey to his mind the idea that the company regarded those that a long time before had been insane, as peculiarly liable to accidents. The construction put upon the contract in the charge was correct. That construction was that the terms "outward and visible means" applied only to injuries not causing death in three months, but to such only as entitled the deceased to certain sums from the company during their continuance as provided by the policy. The part of the charge to the effect that if the wound led to the cause of his death, then it would be an accidental death, could have been understood only in the sense of the wound being produced by an accident; but that this not causing death, did cause him to fall into the water, where he died from drowning, then the death was accidental; so understood, it was entirely correct. The judge was right in charging that if the deceased did not conceal any fact which, in his own mind, was material in making the application the policy was not void. *Rawls v. The American Mutual Life Ins. Co.* 27 N. Y. 282;¹ *Von Lindenau v. Desborough*, 15th Eng. C. L. 290;² and *Valton v. National Loan Fund Life Ins. Co.* 20 N. Y. 32.³ Cases cited by counsel were cases where false answers were given to inquiries made, and have no application to this case. The counsel was mistaken in his exception to the charge, that if the deceased was insane so that he could not know right from wrong, his death in such a condition was an accident which would entitle him to recover. The judge did not so charge. The judge did charge that if his condition at the time was such that he could not distinguish right from wrong, if it was such that he could not be held in his own mind to know that he was doing an act which would produce death, then he was an involuntary agent, and the result of that involuntary act producing death was an accident. This part of the charge was not excepted to. Hence no question arises thereon for review by this court. The defendant can sustain no injury from the want of a proper exception, even if right in its law, for the reason that there was

¹ *Ante*, vol. 1, p. 588.² *Ante*, vol. 2, p. 216.³ *Ante*, vol. 1, p. 436.

Martine v. The International Life Assurance Society of London, &c.

no evidence tending to show that the deceased did not know that keeping his head under water for a sufficient time would cause his death. It was wholly immaterial whether Lawton ever told Johnson that the deceased was insane, or when he told him so. The defendant could not have sustained any injury from this testimony. The judgment appealed [from] must be affirmed with costs. All concur. *Judgment affirmed.*

RANDOLPH B. MARTINE vs. THE INTERNATIONAL LIFE ASSURANCE SOCIETY OF LONDON AND THE EMPIRE MUTUAL LIFE INSURANCE CO.

(62 Barb. 181; S. C. 5 Lans. 535. Supreme Court, January, 1872.)

Foreign company. War. — A foreign insurance company which has issued a policy upon the life of a citizen of this country is to be considered as not affected by the state of war which existed between the different sections of the United States from 1860 to 1864, but is to be deemed a neutral; and the contract of life insurance is not impaired by the war. And when such a company had agents in North Carolina during the war, who were authorized to receive premiums, *held*, that all payments of premiums made in the currency then in use were valid.

Partners. Death. — Where an agency of an insurance company was given to two persons as partners; *held*, that the agency of the firm ceased with the death of one, and that it could not be carried on by the survivor. And after the insured had notice of such death, payments made to the survivor were not to be deemed as valid.

THE case is stated in the opinion.

Harrison & Wesner, for the defendants, appellants.

Matthew Daly, for the respondent.

Present: Ingraham, P. J., and Cardozo, J.

By the Court, INGRAHAM, P. J. The referee in this case has found that the International Assurance Society is a foreign corporation; that in 1851 a policy of insurance for \$5,000 on the life of James Martine was made by such society, the loss payable to his wife, Hester Martine. That James Martine died in October, 1864, in North Carolina, from causes not within the exception in the policy; that all premiums had been paid up to the time of the death of James Martine, and all the conditions of the policy were fulfilled; that Hester Martine duly assigned the claim to the plaintiff, and that the plaintiff was entitled to judgment.

It seems to be conceded that this company is to be considered as not affected by the state of war which existed between the different sections of the country from 1860 to 1864, when Martine

Martine v. The International Life Assurance Society of London, &c.

died, but that they were neutrals, and the existing contract between the company and Martine was not affected thereby.

Nor do I think there is any difficulty as to the payments made to Starke & Pearce as agents for the company, in North Carolina. The testimony of Holbrook is, that they were the agents of the company in Fayetteville, North Carolina, to receive premiums, and that such agency had not been revoked, to his knowledge. The exhibits O, P, and Q expressly authorized the premium to be paid to the agents at Fayetteville, North Carolina, and such payments made to them by the insured would be valid. In like manner, the payments, if made in the currency then in use, if so received, would constitute a valid payment. Such I understand to be the decisions made by this court, and, on some of the points, by the court of appeals, in *Robinson v. The International Life Assurance Co.* 42 N. Y. 54.¹

During the year preceding June, 1862, Starke died, and the payments were made to Pearce, who receipted for the same as surviving partner; and all the subsequent payments were made in the same manner. These receipts, thus given, were full notice to the insured of the death of one of the agents. There is no evidence of any communication with Pearce after that date, nor of any act ratifying his agency, after the death of Starke.

The agency was of the firm of Starke & Pearce. It was not to them as individuals, but as a firm. Both were liable for the acts of either, and the principal had a right to suppose that the joint action of both would be invoked in the discharge of the agency. Whether that agency was merely for the purpose of receiving the money, or for the purpose of passing on the risks to be taken, would not affect the rule. If merely to receive the money, the joint liability of both, for its payment, was required; if for the character of the risks, the judgment of both was necessary. When one died, all further powers of the firm ceased, except for the purpose of settling its affairs. No new business could be transacted in the name of the firm; no new liability could bind the estate of the deceased partner; and no authority could be executed in the name of the firm under a power given previous to the death of the partner.

All the cases relied on by the plaintiff's counsel are cases re-

¹ *Ante*, vol. 2, p. 746.

Greenfield v. The Massachusetts Mutual Life Insurance Company.

lating to the power of the surviving partner in relation to the business of the firm.

I am of the opinion that the agency of the firm ceased with the death of one member of the firm, and could not be exercised by the survivor, either in the name of the firm, or of himself individually; that the insured had notice of such death by the receipt given for the premium in 1862, and that the subsequent payments were not made to any agent of the insurer, so as to make such payment a valid one.

There was error in this finding, and the judgment should be reversed, and a new trial ordered; costs to abide event.

FANNY GREENFIELD, administratrix, &c., respondent, vs. THE MASSACHUSETTS MUTUAL LIFE ASSURANCE COMPANY *et al.*, appellants.

(47 N. Y. 430. Court of Appeals, February, 1872.)

Parties. — Where, by a policy of life insurance, the sum insured is made payable to the "assured, his executors, administrators, and assigns," for the benefit of a third person, an action thereon is properly brought in the name of the personal representative of the assured, who, by the policy, is constituted trustee of an express trust, within the meaning of section 113 of the Code.

Where, in such action, upon motion of the insurance company, the beneficiaries named in the policy are ordered to be and are made parties, the company is precluded from objecting that they are not properly joined with it as defendants.

Non-forfeiture act of Massachusetts. — In an action brought against a Massachusetts life insurance company, the complaint admitted the non-payment of premiums due, but alleged that there was due upon said policy a certain sum, under a statute of said State, ("the non-forfeiture act," passed April 10, 1861,) which provided that no life policy, issued by a company chartered by that commonwealth, shall be forfeited for non-payment of premium, until the expiration of a term of temporary insurance therein provided for, and also alleged notice and proof of death, and a promise of the company to pay the sum claimed to be due. The answer denied that there was anything due upon the policy, under the provisions of the statute referred to in the complaint. *Held*, that the action was based upon the policy, and not upon an account stated; that the answer put in issue the alleged indebtedness upon the policy, and the question was whether the temporary policy provided for by said statute was in life at the time of the death of the assured; and upon this issue the testimony of an experienced actuary, that he had made the computation, in accordance with the statute, and that the temporary policy created thereby had expired prior to the death of the assured, was competent, and the rejection thereof error. Also *held*, that plaintiff had no right to substitute upon the trial, for the cause of action set out in the complaint, one founded upon an account stated, and thereby exclude this defence for the reason that the answer did not set up affirmatively an error, or fraud in the statement of the account.

Waiver. — An insurance company has the right to waive any of the conditions of the policy as to proof, presentation of claim, &c.; and a promise to pay, with knowledge of the facts, is such waiver.

APPEAL from judgment of the general term of the supreme court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the court at special term.

This action was originally brought by the plaintiff, as administratrix of John Greenfield, deceased, against defendant, the Massachusetts Mutual Life Insurance Company, upon two policies of insurance upon the life of John Greenfield. The other defendants are the plaintiff, in her individual capacity, as wife of John Greenfield, the mother and children of John Greenfield, and the son of the plaintiff by a former husband. They were made defendants in pursuance of an order of the court, made on motion of the insurance company. The policy first issued was dated March 13, 1865, and was numbered 10,069. It is the only one as to which any controversy now exists. The money due under the second policy, No. 16,722, dated October 18, 1867, has been paid over and divided between the defendants; and that policy, and all questions under it are, by stipulation, disposed of.

The facts pertinent to the question decided sufficiently appear in the opinion.

The court decided that the administratrix was the only person who could maintain the action; that she was trustee of an express trust. Judgment was directed for amount of policy, with directions as to the disposition of the proceeds.

George Bliss, for appellant.

A. J. Requier, for respondent.

GROVER, J. I think the action originally was properly brought by the plaintiff in her representative capacity against the insurance company. By the policy the defendant undertook to pay to the assured, his executors and administrators, the sum of \$3,000, ninety days after due notice and proof of the death of the assured during the continuance and before the termination of the policy, — \$2,000 of said sum insured being for the express benefit of Jane, the wife, and \$1,000 for Agnes, the mother of the assured. This was a contract made by the assured for the benefit of his wife and mother. The undertaking of the company, in effect, was to pay to the personal representatives of the assured the sum specified in the policy for the benefit of his wife and mother. This constituted such representatives the trustees of an express trust within the meaning of section 113 of the Code, by

Greenfield v. The Massachusetts Mutual Life Insurance Company.

virtue of which they were authorized to prosecute an action for the benefit of the wife and mother. That section provides that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. The order for making the mother and children of the deceased wife¹ and the plaintiff in her individual capacity defendants, was made by the court upon motion of the insurance company, and they having been made such, pursuant to such order, the company is precluded from objecting that they were not properly joined with it as defendants.

The judge before whom the cause was tried received the testimony of the witness Fackler, subject to objection; but in determining the case rejected it as inadmissible under the pleadings, to which the counsel for the company excepted. This presents the important question in the case, as this testimony, if true, proved that under the statute of Massachusetts, by which the company was incorporated, the policy expired in July, 1857, before the death of the assured, which occurred in December thereafter. The counsel for the respondent endeavored to sustain this ruling upon the ground that this action was not based upon the policy, but upon an account stated. This must be determined from the complaint and testimony given upon the trial. The former, after stating the incorporation of the company, and the facts showing its right to transact business in this State, alleges the issuing of the policy by the company to the assured, and the terms thereof; from which it appears that the company on the 13th of March, 1865, in consideration of the sum of \$123.90 paid, and of a like sum to be paid on the 13th of March in each year thereafter, during the life of the assured, conditionally, &c. The complaint does not state that any premium was paid to the company after March 13, 1865, but proceeds to set out section 122 of the Massachusetts statute, passed April 10, 1861. The complaint admits the non-payment of the premiums as required by the policy, and avers that,

¹ This should doubtless read, "The order for making the mother and children and wife of the deceased," &c.

Greenfield v. The Massachusetts Mutual Life Insurance Company.

notwithstanding such default, there became due under said policy, in pursuance of the said provisions of the said act of 1861, the sum of \$2,660.96, payable in ninety days after the said notice and proof of the death of the assured as aforesaid. The complaint further avers that John Greenfield, the assured, died December 9, 1867, and that on the 6th day of March, 1868, the plaintiff gave the defendant, the insurance company, notice and proof of the death of the assured, and that the company at that time, and at divers other times, waived any further or other notice of claims or proof of death, and promised to pay the sum of \$2,660.96 on said policy. The company, by its answer, denied each and every allegation of the complaint not thereafter expressly admitted or denied. The answer admitted the incorporation of the company, the making of the contract of insurance, and some other matters, but did not admit that there was anything due upon the policy under the provisions of the aforesaid statute of Massachusetts. The allegation of the complaint, in this respect, was therefore denied by the answer. It devolved upon the plaintiff to prove it, if its truth was essential to a recovery. That it was so essential is manifest, for the reason that, upon the face of the complaint, it appears that in the absence of the statute the policy lapsed for non-payment of premium in March, 1867, nine months before the death of the assured. That it terminated at that time and ceased longer to impose any obligation upon the company, or promise to pay the amount made after the death, which occurred in December, 1867, would be without any consideration, and therefore void. The continuance of the policy in life, by virtue of the statute, was not only set out in the complaint as the basis of the right of recovery, but, in fact, was essential to such right, as without it there could be no pretence that the company, at the time of the death of the assured, had any contract of assurance whatever upon his life. The plaintiff was, therefore, bound to prove this fact. It is clear, upon both principle and authority, that under a general or specific denial of any fact, which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it. *Wheeler v. Billings*, 38 N. Y. 263. If an answer containing a denial of the allegations of the complaint, except as thereafter stated, is rendered indefinite, uncertain, or complicated, the remedy is by motion to make the answer more definite, and not the exclusion of evidence

Greenfield v. The Massachusetts Mutual Life Insurance Company.

upon the trial. To show the materiality of the testimony of Fackler, which was rejected, a brief examination of the statute in question is necessary.

Section one provides in substance that no life policy thereafter issued by any company, chartered by that commonwealth, shall be forfeited by non-payment of premium, any further than regards the right of the party insured to have it continued in force, beyond a certain period to be determined as follows: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained according to the combined experience or actuaries' rate of mortality, with interest at four per cent. per annum. After deducting from such net value any indebtedness to the company by the assured, or notes held against the assured, which notes, if given for premium, shall be then cancelled, four fifths of the remainder shall be considered as a net single premium of temporary insurance. And the time for which it will insure shall be determined according to the age of the party at the time of the lapse, and the assumptions of mortality and interest aforesaid. Section 2 provides that, if the death of the party occur within the term of temporary insurance covered by the value of the policy as determined by the previous section, the company shall be bound to pay the amount of the policy, the same as if there had been no lapse of premium. The question was, whether the temporary policy was in life at the time of the death of the assured. The plaintiff showed, *prima facie*, that it was, by proving that the company, with knowledge of the time of the death, had promised to pay. Fackler's testimony showed that he was an experienced actuary. That he had computed the net value of the policy in March, 1867, at the time it would have lapsed for non-payment of premium but for the statute, and made deductions therefrom, which accord with the statute, and that the temporary policy created by the statute expired as early as July 1st, 1867. This, if correct, was a complete answer to the presumption that it continued in life until December 13, 1867, the time of death, founded upon the promise of the company to pay, made thereafter. This testimony proved that the temporary or time policy created by the statute had expired months previous to the death, and showed that, in fact, the plaintiff had no right of recovery. We have seen that the cause of action set out in the complaint was founded upon the

temporary policy created by the statute. That the answer was sufficient to entitle the company to prove that that policy had terminated by lapse of time prior to the death of the assured. This being so, the plaintiff had no right, upon the trial, to substitute for the cause of action set out in the complaint one founded upon an account stated, and base a recovery upon the latter cause, thereby excluding evidence of a defence, for the reason that the answer did not set up, affirmatively, some error or fraud in the statement of the amount. If the plaintiff relied upon any such ground for a recovery, the complaint should have been amended, setting up such a cause of action, and this would have entitled the defendant to amend his answer setting up his defence. This renders it unnecessary to examine whether the testimony proved an amount [account?] stated. I think it did not, for various reasons, but as that is immaterial, the question will not be further considered or passed upon. The evidence of Fackler, which was improperly rejected, if true, showed that the plaintiff had no cause of action. For the error of the court in rejecting his testimony, the judgment must be reversed and a new trial ordered. This renders it unnecessary to determine the question whether the proof of death and claim made by the plaintiff, upon the temporary policy created by the statute, was sufficient, within the requirements of the second section of the statute, in those respects; but as the question may become material upon the re-trial, in case the plaintiff shall be able to show that the policy was in life at the time of the death, it will be proper to determine it. Upon this assumption, the plaintiff had a valid claim upon the policy by complying with its conditions, as to proof of death, and presenting the claim to the company. The company had the right to waive any of these conditions. Proof of death was duly made. The objection is the neglect to present a claim founded on this policy. The company had a right to waive this formality. The promise by the company to pay, with full knowledge of the fact, was a waiver, and obviated the objection within all the authorities. The judgment appealed from must be reversed and a new trial ordered, costs to abide event. All concur.

Judgment reversed.

Smith v. The Ætna Life Insurance Company.

CHARLES F. SMITH, appellant, vs. THE ÆTNA LIFE INSURANCE COMPANY, respondent.

(49 N. Y. 211. Court of Appeals. April, 1872.)

Concealment. — Defendant issued a policy upon an application wherein the applicant stated that the insured was in good health, and usually enjoyed good health; that no circumstance which might make the risk more than usually hazardous was concealed or withheld. To a question, whether the insured had had certain diseases, among them disease of the heart, palpitation, spitting of blood, &c., the answer was "See surgeon's report;" it was also stated that the insured had no physician. The examining physician, in answer to a question whether the insured had cough, occasional or habitual, or expectoration, or occasional or uniform difficulty in breathing, answered, "No cough; walking fast up stairs or up hill produces difficulty in breathing." In fact the insured had raised blood from two to two and a half years prior to and down to his death; and a physician had been consulted and prescribed therefor. He had failed in health prior to the application; and he died three months after the issuing of the policy of pleuro-pneumonia. The referee rendered judgment against defendant. *Held*, there was a fraudulent concealment and misrepresentation of material facts, and an order of the general term setting aside the judgment was proper.

APPEAL from an order of the general term of the supreme court in the fourth judicial department, setting aside a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 5 Lans. 545.)

Action upon a policy of insurance issued by defendant for \$2,000, upon the life of Jonathan C. Smith, father of plaintiff.

The material facts are set forth in the opinion.

Lyman Tremain, for the appellant.

Rollin Tracy, for the respondent.

PECKHAM, J. The action was upon a policy of insurance applied for by the plaintiff on the 19th day of January, 1867, upon the life of his father, J. C. Smith; policy issued February 11, 1867, and the insured died May 11th, same year.

In the application for insurance, plaintiff stated that his father "is now in good health, of sound body and mind, and usually enjoys good health, . . . and that I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health or condition which may render an assurance of his life more than usually hazardous, or with which the directors of said company ought to be made acquainted." The questions and answers were signed by the applicant with his name and with that of the insured, and it was agreed that if the answers were in any respect false or fraudulent the policy would be void. Among the questions were these: "Has the party ever had any of the following diseases (naming

some twenty in number, among which are asthma, disease of the heart, palpitation, and spitting of blood)?” The answer is, “See surgeon’s report.” Another question: “Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted?” Answer: “Had no physician.” Another: “Has the party, or has he had, an habitual cough?” Answer: “No.”

The examining physician, in answer to the question “whether the party has ever suffered from disease of any kind,” said “No;” also, in answer “whether cough, occasional or habitual, or expectoration, or occasional or uniform difficulty in breathing, or palpitation,” the physician said: “No cough; walking fast up stairs or up hill produces difficulty in breathing; no palpitation.”

The referee found generally for the plaintiff, and that deceased died of pleuro-pneumonia, and he refused to find that deceased was afflicted with spitting of blood at time of or prior to the application.

The general term granted a new trial on questions of fact, and hence they are open to review in this court. Code, § 268.

Then, was the deceased in “good health” when this application was made, or did he then “usually enjoy good health?” Had he had spitting of blood, asthma, or disease of the heart? These were all material questions, and their concealment was just as fatal to this contract as their denial. I think it is established beyond doubt or contradiction that he had spitting of blood for months prior to this application. I am satisfied he had disease of the heart for many months prior to his death; but a question was made among the doctors upon that point, and whether he died of pneumonia or of disease of the heart, and I do not intend to examine that point now, if at all.

As to spitting blood, his physician, Dr. Hoxie, testified to his raising blood from two to two and a half years prior to his death. The doctor called it a passive hemorrhage of the lungs. He spoke to the doctor about it. “He would cough, and when he raised, it was partially mixed with blood; this continued to the time of his death. It would and did have a tendency to weaken him. Some one and a half or two years before he died he was at our house frequently, and requested me to prescribe for this difficulty, and I did so. He told me that expectoration of blood had continued two and a half years before he died; a rusty-colored,

Smith v. The *Ætna Life Insurance Company*.

bloody expectoration." This witness visited him in his last illness, a very few days prior to his death.

John Aiken: Lived within one and one fourth of a mile of him; saw him once a week; never saw him spit blood, but heard of it. Witness noticed a general failing of his health in June, 1866; he looked sick.

Eli Smith, brother-in-law of deceased, saw him spit blood in December, 1866.

Wayne Gallup: Noticed failing of deceased for some time before he died, particularly in the last fall and winter; talked with him in the winter, and he said he had been failing for some time and had been raising blood; noticed his failing two or three months before that.

Eli Smith, son of the deceased, testified to his spitting blood "the summer before his death; saw him quite often a year or two before his death; he stayed with witness then; it continued while he lived."

This is all the testimony as to spitting of blood, except plaintiff's proof that he spit blood in his last illness. There is not a word of contradiction. The plaintiff, the son of the deceased, was examined, but was asked nothing on the subject. Had he not known of the blood-spitting, it is clear he would have so stated. The plaintiff knew that the defendant regarded this as a fact material to the contract. The question was distinctly put to the plaintiff, and plainly evaded. The matter was referred to the examining doctor, who knew nothing upon the subject, as he had never attended the deceased. He falsely stated he had had no physician, when he had been doctoring for shortness of breath and this blood-spitting for months. This was told to prevent inquiry of his doctor. Can any one pretend that the company did not regard this fact as material to this risk, — to this contract? This, then, was a palpable, fraudulent concealment of a material fact; it was also a plain untruth in stating that he was then in good health. He repeatedly spoke of his health as failing; so he appeared and so continued till he died. The son, the plaintiff, was obviously the manager in this business. He signed the name of the deceased, though with his consent.

In my judgment here is a plain fraud clearly proved. Unless a different rule is to be adopted in reference to an insurance company than prevails among others, this fraudulent attempt at

Hincken v. The Mutual Benefit Life Insurance Company.

speculation should not succeed. Such frauds, if successful, always beget others; they have followers. Besides, they confound all calculation of insurance companies for sound insurance, thus necessarily increasing their rates, and compelling honest applicants to pay higher premiums by reason of such dishonest practices.

The action of the supreme court was plainly right. It is their duty to set aside a verdict which is against the clear weight of the evidence; not merely as this is, against the evidence. In deciding a case upon the facts, this court occupies the same position which that court held upon this subject.

Justice would be promoted if the supreme court should more frequently exercise its unquestioned right of reviewing verdicts upon the facts.

The order appealed from is affirmed, and judgment absolute ordered for the defendant. All concur except ALLEN and RAPALLO, JJ., not voting.

Judgment accordingly.

EDWARD HINCKEN *et al.*, executors, respondents, *vs.* THE MUTUAL BENEFIT LIFE INSURANCE Co., appellant.

(50 N. Y. 657. Court of Appeals, June, 1872.)

Preliminary proofs. — The fact that preliminary proofs have been delivered is some evidence of the performance of the provision requiring them; and these proofs being in possession of the defendants, and not having been accounted for or produced by them, and the company having received the proofs without objection, it will not be assumed that they were defective.

THIS action was upon a policy of life insurance for \$10,000 upon the life of Peter Rice, which sum was agreed to be paid "within ninety days after due notice and proof of interest and of the death of said Peter Rice." Upon the trial the only evidence of compliance with this condition was in response to the following question, asked a witness by defendant's counsel: "Did you deliver preliminary proofs?" The witness answered that he did, at defendant's office, and fixed the time more than ninety days before the commencement of the suit.

At the close of the evidence defendant's counsel moved to dismiss the complaint upon the ground that plaintiffs were bound to produce in evidence the proofs served, or some proofs, to show a performance of the condition precedent, furnishing due proof of Rice's death ninety days before suit brought.

Horn v. The Amicable Mutual Life Insurance Company.

The motion was denied and plaintiffs obtained a verdict. *Held*, that the fact that preliminary proofs had been delivered was some evidence of the performance of the condition precedent; and these proofs being in defendant's possession, and it not having accounted for or produced them, and having received and retained them, as far as appears, without objection, it would not be assumed that they were defective, and that the evidence was sufficient to sustain the verdict.

Alvin C. Bradley, for the appellant.

George G. Reynolds, for the respondents.

ALLEN, J., reads for affirmance.

All concur.

Judgment affirmed.

Reported below, *post*, p. 734.

HORN *et al.*, executors, *vs.* THE AMICABLE MUTUAL LIFE INSURANCE CO.

(64 Barb. 81. Supreme Court, November, 1872.)

Statements as to health. Concealment. — An applicant for insurance, upon his examination, prior to the issuing of the policy, was asked to name the physician usually employed by him, and, if he had none, then to name any other who could be applied to for information upon the state of his health. His answer was, "None." The fact was that he had occasionally applied to Dr. N. for remedies for a severe cough of long standing, shortness of breath, and expectoration, during six or seven years, and Dr. N. had prescribed for him. He had also applied to another company for insurance, and had been examined by Dr. F., the medical adviser of that company, and the application had been refused, on the certificate of that examination. The examination was made on the 9th of October, and his answers to the written questions, on the application in this case, were made on the 18th of the same month. He stated to Dr. F., on that occasion, that he discharged from his lungs very profusely at times, that he had coughed all of the previous night, and "coughed up" a good deal, that the expectoration was streaked with blood, and that he had night sweats sometimes for several nights in succession. This was proven to have been chronic. *Held*, that as the applicant knew that both of these physicians could give important information as to his health, and did not mention them, but on the contrary said, in effect, that there were none who could give such information, he had been guilty of a fraudulent concealment, vitiating the policy. *Held*, also, that it was not for the jury to say whether the applicant was justified in giving the answer which he did; and that a charge that it was for them to decide was erroneous.

Warranty. — The statements in the application, though made part of the policy, *held*, to be representations merely, and not warranties.

APPEAL, by the defendant, from a judgment entered on a verdict of a jury.

The action was brought by the plaintiffs, as executors of John Wahl, deceased, upon a policy of insurance issued by the defendant upon the life of the testator.

By the Court, LEONARD, J. It is insisted, for the defendant, that the statements of the insured, in his application for the policy, must be taken as warranties. These statements are incorporated and made part of the policy, and if the knowledge of the insured, concerning his health or his vital organs, is of the same certain character as that of applicants for marine and fire risks, there can be no doubt that the rule of construction should be the same.

In applications for marine and fire policies, the statements relate to material facts, and it is negligence or fraud on the part of the applicant for a policy, if he does not truly represent the facts. There is every reason in favor of holding such statements to be warranties.

In respect to life policies, it may be wholly different. The applicant may not know enough of the human system to be aware of the existence of some affection of the vital organ. The victim of Bright's disease, or of an affection of the heart, liver, or lungs, may be, and often is, in the enjoyment of such a condition of health and strength as to lead him to the belief that his vital organs are all sound. It would be monstrous to hold, in such a case, that the applicant warranted himself to be sound, as to those organs, by an answer to the effect that he was never sick, or had no disease of those organs. The company retain their own medical advisers for the purpose of making a careful and scientific examination of all applicants for life insurance; and they are far better able to detect incipient disease than the subject, in most cases. I think these statements are not understood or intended by the parties as warranties. I think the judge, at the trial, properly held that the inquiry was one of honest and fair dealing on the part of the applicant; and that the statements concerning the condition of his health were not warranties.

I have observed the decision in *Miles v. Conn. Mut. Ins. Co.* 3 Gray, 580,¹ which fully sustains the point urged by the defendant's counsel. It is not founded upon any analogous case of a life insurance policy, — unless it be the case of *Vose v. Eagle Life and Health Ins. Co.* 6 Cush. 42.² But a reference to this latter case shows that it was decided upon the misrepresentation of the assured, as well as upon the ground of warranty; and upon

¹ *Ante*, vol. 1, p. 173.

² *Ib.* p. 161.

Horn v. The Amicable Mutual Life Insurance Company.

the last mentioned branch of the case, no authority is cited in support of it. I am not aware that a like rule has been held in the State of New York, and I am unwilling to originate such a doctrine as law.

The assured must state all that he knows, bearing upon the condition of his health ; and any untrue statement or concealment in this respect ought, justly, to render the policy void. In all respects where it appears, or can be proven, that the applicant had any knowledge of the facts called for by the interrogatories, it matters very little whether the answer be held a warranty or not, inasmuch as an untrue statement will be a misrepresentation or fraud which will equally render the policy void.

There is, however, a material fact in the case under consideration as to which the insured had actual knowledge ; and his answer can be regarded in no other light than an intentional concealment and fraud. He was asked to name the physician usually employed by him, and if he had none, then to name any other doctor who could be applied to for information upon the state of his health. His answer was, "None." The fact was, that he had occasionally applied to Doctor Nolan, for remedies for a severe cough of long standing, shortness of breath, and profuse expectoration, during six or seven years between 1861 and 1868, and Dr. Nolan had prescribed for him.

He had also applied to the Excelsior Life Insurance Company, and had been examined by Doctor Fowler, as the medical adviser of that company ; and his application had been refused on the certificate of that examination. That examination was on the 9th of October, and his answer to the written questions, on the application in this case, was made on the 18th of the same month. He had stated to Dr. Fowler, on that occasion, that he had discharged from his lungs very profusely, at times ; that he had coughed all of the last night, and "coughed up" a good deal, and that the expectoration was streaked with blood ; that he had night sweats, sometimes several nights in succession. This was proven to have been chronic, and necessarily of long standing.

The applicant knew that both of these doctors could give important information as to his health, but he did not mention them, but said in effect, on the contrary, that there were none who could afford such information. There was no contradiction of evidence on this point. It was clearly a fraudulent conceal-

Cohen v. The New York Mutual Life Insurance Company.

ment, and ought to have been so held, as a matter of law. There was no answer to it.

The motion to dismiss the complaint ought to have been granted. It was not for the jury to say whether the applicant was justified in giving the answer which he did; and the charge was erroneous in this respect.

There must be a new trial, with costs to abide the event.

Note. — That the statements of an application incorporated into the policy are warranties, and must be strictly complied with, see *Campbell v. New England Life Ins. Co.* 98 Mass. 381; *S. C.*, ante, vol. 1, p. 229; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *S. C.*, ante, vol. 2, p. 341.

HENRIETTA YATES COHEN, appellant, vs. THE NEW YORK
MUTUAL LIFE INSURANCE COMPANY, respondent.

(50 N. Y. 610. Court of Appeals, December, 1872.)

Effect of war. — Plaintiff's complaint alleged, in substance, that defendant, a corporation organized in the State of New York, in 1849, issued to plaintiff, a resident of the State of Georgia, a life policy upon the life of her husband, which policy contained a clause that, in case of non-payment of the annual premiums, "the said policy should cease and determine," and "all previous payments made thereon should be forfeited to the company;" that the annual premiums fell due upon the second of April in each year, and were paid regularly up to and including the year 1861; that plaintiff was ready and willing to pay the premium falling due April 2, 1862, and those falling due during the existence of the civil war; that, in consequence of the war, all intercourse was interrupted and forbidden by the laws of the United States, and she was thereby prevented from making payment; that, as soon as communication was reestablished after the war, she tendered payment of the accrued premiums, but defendant refused to receive them, declaring the policy forfeited. Plaintiff asked that she be allowed to make the payments and the policy be declared valid, or that defendant be compelled to pay back the premiums paid, with interest, and the dividends, &c. Defendant demurred, that the court had no jurisdiction, and that the complaint did not state a cause of action. Judgment was rendered sustaining demurrer. *Held*, that the contract was not dissolved, but suspended, by the war; that the payment of the premiums during its existence was legally excused, and the tender revived the policy; that although there has been no loss, yet as there is an actual controversy, and the only parties to it are before the court; as the present rights of plaintiff under the contract are denied; as the contract of life insurance is a peculiar one; and as it is fit and proper the parties should know their rights under the contract, the case was a proper one for the exercise of the equitable powers of the court; and that the judgment was therefore error.

APPEAL from judgment of the general term of the superior court of the city of New York, entered upon an order affirming order of special term sustaining demurrer to plaintiff's complaint.

The complaint alleged in substance that defendant was a corporation, organized under the laws of the State of New York;

Cohen v. The New York Mutual Life Insurance Company.

that on the 2d of April, 1849, in consideration of \$150 paid them by plaintiff, and of annual premiums of that amount, to be paid thereafter, it executed and issued to her a policy of insurance upon the life of her husband, Octavus Cohen, in the amount of \$5,000, for the term of his natural life ; that the policy contained the conditions that if the said Octavus Cohen should enter into any military or naval service whatever, (except the militia not in actual service,) or should die by his own hands, or in consequence of a duel, or by the hands of justice, or in known violation of the laws of any of the States, or of the United States, &c., then said contract or policy should be void. Also, if plaintiff should not pay the said annual premiums, on or before the several days mentioned in the contract, then the company should not be liable for the sum assured, or any part thereof, and that said policy should cease and determine, and also that all payments made thereon should be forfeited to the company ; that plaintiff paid the annual premiums, as required by the policy, up to and including the payment due April 2, 1861 ; that she was ready and willing to pay the premiums falling due in April, 1862, 1863, and 1864, but that she being a resident of Georgia, and as in consequence of the civil war then pending between the Southern States and the Government of the United States all intercourse between the citizens of the two sections was interrupted and forbidden by the laws of the United States, she was prevented from making such payments ; that, as soon as communication was reëstablished, and in December, 1864, she tendered to defendant the premiums that had accrued during the war, but defendant refused to receive the same, and declared the said policy cancelled and forfeited. She asked as relief that she might be permitted to make the payments, and that her policy be declared valid, or that defendant be compelled to pay back to her all sums paid upon the policy, with interest, and all dividends declared under the policy, or for such other and further relief, &c. Defendant demurred on the ground :—

1. That upon the face of the said complaint it appears that the court has no jurisdiction of the subject of this action.

2. That upon the face thereof it appears that the said complaint does not state facts sufficient to constitute a cause of action.

Joseph H. Dukes, for the appellant.

H. E. Davies, for the respondent.

Cohen v. The New York Mutual Life Insurance Company.

ALLEN, J. A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided, their appeals might be heard.

The importance of the questions at issue induced the court to listen to the request, and this case was substantially reargued, with *Sands v. The New York Life Ins. Co.*, in December last.¹

The legal status of citizens of states at war, and the relation they mutually occupy, as well as the effect of a state of war upon contracts and obligations of the subjects of litigant [belligerent?] states, and their right to contract or hold intercourse with each other, have recently been so frequently the subject of judicial discussion and decision in the state and federal courts, that the leading principles by which the intercourse and dealing between enemies, that is, between the inhabitants of states and nations at war, are prohibited or restricted and regulated, and the effect of war upon their mutual contracts and obligations, are quite familiar.

They have been so often repeated in different forms, that a review of them, or a reference at much length to them, would be out of place.

The general principles and doctrines, as found in the treatises of writers upon public law and deducible from the judgments of courts, are firmly established and cannot be ignored or essentially modified by courts at this day. All that courts have to do is to apply the principles thus recognized and settled to cases as they arise. It is said in general terms that, in a state of war, "the individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion," and all intercourse between them is forbidden. Per Johnson, J., *The Rapid*, 8 Cranch, 155. This proposition has been repeated with approval in several later cases. Judge Nelson, in the *Prize Cases*, 2 Black, 635, 687, adopting the language of approved writers on international law, says that one of the legal consequences resulting from a state of war is, that "the people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, between them unlawful; and all contracts existing at the commencement of the war suspended, and all made during its

¹ *Post*, p. 726.

existence utterly void. The insurance of enemy's property, the drawing of bills of exchange or purchase on the enemy's country, the remission of bills or money to it, are illegal and void; all existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of the war itself." See, also, *Jecker v. Montgomery*, 18 How. 110; *Hanger v. Abbott*, 6 Wall. 532; *The Ouachita*, Ib. 521; *Griswold v. Waddington*, 16 Johns. 438. These propositions, general and far reaching as they are, were, however, made in cases relating to commercial intercourse, and involved the question as to the legality and effect of commercial dealings and transactions; and the general language used, in legal effect, extends only to intercourse and dealings of that character, although all other intercourse, clearly within the mischief intended to be avoided, would be within the principle, and therefore within the rule itself. I do not understand that it has been authoritatively adjudged that all private contracts without exception, made between citizens or subjects of states at war, are necessarily void, although the language of the courts has been sufficiently comprehensive to include the proposition in its largest extent.

The subject is elaborately and ably considered in *Kershaw v. Kelsey*, 100 Mass. 561, and the authorities, with the reason and extent of the rule under consideration, reviewed and discussed; and the result of the examination was that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between those countries. This was regarded as including every act of voluntary submission to the enemy, or receiving his protection; any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, direct or indirect. The act of Congress of July 13, 1861, (12 U. S. Stat. at Large, 257,) and the proclamation of the President, pursuant to that statute, only prohibited commercial intercourse between the citizens of the States declared to be in insurrection and the citizens of the rest of the States.

For all the purposes of this action it may be assumed that this rule, thus restricted, would prohibit the making of a contract during a state of war for the insurance of the life of an enemy.

This was rather assumed by the counsel for both parties upon the argument. It would certainly forbid the transmission of money for the premium from one of the states at war to the other; and it is said that the life of an alien enemy cannot be insured by his creditor, although the latter may be a subject of the same country with the insurer. *Bunyon's Life Assurance*, 19. The authorities cited to sustain this proposition were all, however, cases of insurance upon merchandise. *Harman v. Kingston*, 3 Camp. 150; *Potts v. Bell*, 8 T. R. 548; *Flinndt v. Waters*, 15 East, 260. The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made in 1849, and was "for the term of his natural life," in consideration of a sum paid at the date of the policy, and the further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium. It is expressly declared in the contract of insurance that if the annual payments should not be made, "that said policy should cease and determine," and "that all previous payments made thereon should be forfeited to the company." It was a life policy. *Hodsdon v. Guardian Life Ins. Co.* 97 Mass. 144; ¹ *Ruse v. Mutual Benefit Life Ins. Co.* 26 Barb. 556; ² *N. Y. Life Ins. Co. v. Clopton*, 7 Bush R. 179.³ The contract was not, as to all its stipulations and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk; and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies upon young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss, the result of advanced age, has been in-

¹ *Ante*, vol. 1, p. 218.² *Ib.* p. 467.³ *Ante*, vol. 2, p. 709.

curred. The contract was a continuing contract in the sense that it was to be performed in the future ; but it was not a contract of continuance in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and, in this respect, was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretence that a contract of the latter^e kind would be dissolved by war. The contract would remain ; the remedy would be suspended. The act to be performed by the plaintiff was a single act, to be performed at stated periods, and was not like the contract of partnerships and some other contracts which are continuous in their performance. In the case of a marine insurance, or a contract of affreightment, a war might act as a dissolution and put an end to them. The first is upon enemies' property, and an insurance is in support of their commerce, and entirely inconsistent with the allegiance due to the government of the underwriter. As to such a contract, the authorities say the insurance terminates absolutely, and at once, by the very act of war, and the parties are in the same condition as if no contract was made ; the one loses the premium, and the other his security against loss. But the rule will hardly apply to a life policy when large sums have been paid for premiums. There is nothing in the policy of the law, or the interests of the public, calling for an enforcement of the law of confiscation incident to a state of war, after the war has ceased and the people of the two belligerent nations have again become one, solely for the benefit of one of two contracting parties by the forfeiture of the rights of the other. This would be simply a confiscation of property after the war had ceased, at the instance and for the benefit of individuals. By the payment of the annual premium in April, 1861, the life was insured until April, 1862. The engagement of the defendant was then lawful, and was to the effect that the company would pay the plaintiff \$5,000 upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory ; and if the death occurred within the year, although after war had intervened the right of action would be suspended during the war, but would revive with the return of peace. There is no reason apparent why the promise to pay money upon the termination of a specified life should necessarily

be terminated by the happening of war between the States of which the parties are respectively subjects, as unlawful and inconsistent with the state of war merely because it is called an insurance upon life. The policy in this instance protects the insurers, and makes void the policy if the insured enter any military or naval service, or die in the known violation of the laws of the United States; so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of its army and navy affected by the insurance upon the life of its citizens. Those insured would rather be deterred from taking up arms against the United States lest their policies should be avoided.

Had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war. The contracts between the individuals of belligerent states are necessarily suspended during the war of those states, but are not annulled. Phill. Int. Law, 666; per Nelson, J., *Prize Cases*, *supra*. Mr. Wheaton says commercial partnerships are dissolved by the mere force and act of war, though, as to other contracts, it only suspends the remedy. Wheat. Int. Law, 8th ed. 403, § 317.

This is upon the principle that the state and not the individual wages war. The question then remains, whether the non-payment of the annual premium during the years 1862, 1863, and 1864, involved a forfeiture of the policy and of all payments before then made. That such would be the effect of the non-performance of the condition, unless waived or legally excused, is not disputed; and unless the performance was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the States, and that individual citizens are not identified with their governments so as to expose them to the rule of law that he who, by his own conduct, prevents the fulfilment of a contract or renders its performance impossible, shall not take advantage of a non-performance on the other side or excuse the non-performance upon his part. *Odlin v. Ins. Co. of Pennsyl-*

Cohen v. The New York Mutual Life Insurance Company.

vania, 2 Wash. C. C. R. 312; *Francis v. The Ocean Ins. Co.* 6 Cow. 404; *S. C.*, in error, 2 Wend. R. 64. The condition of affairs which made the payment of the premium by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition and an impossibility created by law or the act of the government. This is clearly recognized in *Wood v. Edwards*, 19 Johns. 205; *People v. Bartlett*, 3 Hill, 570. An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or his government, or of the obligee. See per Nelson, Ch. J., *People v. Bartlett*, *supra*. In *Wolfe v. Howes*, 20 N. Y. 197, the performance of the undertaking became impossible by the act of God in the death of the party, and performance was held excused upon the ground that the parties must be deemed to have made this an exception by implication. So, too, a party is excused from the performance of his covenant when the performance is made unlawful by act of parliament. If made absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation. *Brewster v. Kitchin*, 1 Ld. Raymond, 317. Lord Alvanley, Ch. J., (in *Touteng v. Hubbard*, 3 B. & P. 291,) says: "But when the policy of the state intervenes and prevents the performance of the contract, the party will be excused." That which will avoid a covenant will nullify a condition, and *vice versa*. Platt on Cov. 569; *Doughty v. Neal*, 1 Saund. 216, note 2. The policy of the law is to mitigate the severity of wars and relieve citizens, so far as is consistent with the interests of the government, from the hardships incident to it; and, *a fortiori*, the stringent and severe rule invoked by the defendant should not be applied in a doubtful case so as to produce extreme hardship, when, by adopting a milder and more equitable rule, each of the contracting parties will secure equal and exact justice and all their legal and equitable rights. The operation of the statute of limitations is held suspended during the period of the war by reason of the inability to enforce the claim, and this is in harmony with the benign tendency of the age, the result of advanced civilization. *Hanger v. Abbott*, 6

Wall. 532. Judge Clifford says: "Neither laches nor fraud can be imputed in such a case." At the time of making the contract in this case the plaintiff had the legal right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful without any fault on her part. The operation of a condition, as express and absolute as in this case, was held suspended during the war, in *Semmes v. Hartford Ins. Co.* 13 Wall. 158. The condition there, as here, was by the act and agreement of the party, and yet its performance being impossible it was held to be inoperative and the time for bringing the action extended, notwithstanding the agreement of the parties, by the mere act and effect of the war. It was held that the disability to sue, imposed on the plaintiff by the war, relieved him of the consequences of failing to bring suit within the time specified in the policy. The same principle would relieve the present plaintiff from the consequences of failing to make the annual payments by the day. She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make, now, the payments which she could not lawfully make between 1861 and 1865.

The interest will compensate for the non-payment at the time, and the defendant, in legal contemplation, will be precisely in the situation it would have been had the money been paid on the law day. *Manhattan Life Ins. Co. v. Warwick*, 20 Grattan, 614;¹ *N. Y. Life Ins. Co. v. Clopton*, 7 Bush, 179;² *Hamilton v. N. Y. Mut. Ins. Co.*,³ recently decided in the circuit court of the United States, in the Southern District of New York, are precisely in point, and, if followed, decisive of this case. The reasonings of the prevailing opinions in these cases abundantly sustain the judgments. The case comes before us on demurrer to the complaint, and if there are any equities or any facts which would deprive the plaintiff of the rights to which the case made by the complaint entitles her, the defendant may set them up by answer.

It was also claimed that the defendant being a mutual company, of which all holders of policies were members, it was a partnership which was dissolved by the war.

Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the states of the several

¹ *Ante*, vol. 2, p. 168.

² *Ib.* p. 709.

³ *Post*, p. 787.

partners. But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer; and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff as a member of the company, one of the corporators; but this does not make the members partners as between themselves, or affect the express contract of the corporation. If it was a partnership as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant.

The defendant also objects to the right of the plaintiff to maintain an action at this time, there having been no loss, and, therefore, no cause of action upon the policy. The allegations of the complaint are that the plaintiff had tendered the premiums due, and that the defendant refused to receive them, and declared the policy cancelled and forfeited. This is a peculiar case; and there are many reasons, unless there is some rigid rule forbidding the court to entertain jurisdiction, why it should determine the matters in controversy at this time. 1. There is an actual controversy existing, and the only parties to it are before the court. There is not the reason for declining jurisdiction that presented itself in some of the cases cited by the defendant, as in *Grove v. Bastard*, (2 Phil. Eng. Ch. 619,) that all the parties in interest could not be heard and their rights determined. 2. Present rights, under the policy and incident to it, are denied the plaintiff. Her policy having been declared forfeited and cancelled, she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and at all times to the privileges of other policy holders, and to be recognized as such. 3. The plaintiff is entitled, if the right to pay the premiums and continue the policy still exists, to pay the

Cohen v. The New York Mutual Life Insurance Company.

arrearages and stop the accruing of interest, and to make the future payments as they accrue, and become due without interest, and relieve herself as well of the risk and burden of retaining the money, which of right belongs to the defendant. 4. The contract of insurance, where the policy is to be kept alive by periodical payments, is peculiar, and the duty to pay and the obligation to receive are mutual. It is somewhat different from a simple obligation to pay money, and a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is essential as evidence of the continuance of the contract as is the original policy. The policy holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. 5. It is fit and proper that both parties to the contract should know their rights; especially is it important to the plaintiff and the insured that, if this policy is avoided, they may seek insurance elsewhere, and, if valid, that they may perform the conditions of the policy.

In ordinary cases courts will not, in advance of any present duty, obligation, or default declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right. It was done in *Baylies v. Payson*, 5 Allen, 473. Courts of equity depart from the ordinary rules by which their jurisdiction is hedged in, in order to do equity between suitors; and whether a proper case is made for the exercise of the equitable powers of the court necessarily depends upon the circumstances. See *Ball v. Coggs*, 1 Brown's Parl. R. (Toml.) 140; *Buxton v. Lister*, 3 Atk. 383; 2 Story on Eq. Jur. § 826.

Had the parties made a case containing precisely the facts alleged in the complaint for submission under section 372 of the Code, the court would not have hesitated to entertain jurisdiction and pass upon the merits of the controversy.

The court has jurisdiction, and the judgment must be reversed and judgment given for the plaintiff, with leave to defendant to answer.

CHURCH, Ch. J., PECKHAM, and ANDREWS, JJ., concur.

GROVER, FOLGER, and RAPALLO, JJ., not voting.

Judgment accordingly.

See note to *Dillard v. Manhattan Life Ins. Co.*, ante, p. 548.

Sands v. The New York Life Insurance Company.

STEPHANIA LUCY SANDS, respondent, *vs.* THE NEW YORK
LIFE INSURANCE COMPANY, appellant.

(50 N. Y. 626. Court of Appeals, December, 1872.)

Effect of war. — The payment of premiums upon a life policy, and the remedy in case the policy becomes due during the war, are simply suspended until peace is restored. No forfeiture will arise for the non-payment of the premiums during the war, provided they are promptly paid, with proper interest, on the return of peace.

Defendant had a general agent residing in Mobile at the time of the breaking out of the war of the rebellion; his authority to receive premiums was recognized by it after the issuing of the President's proclamation forbidding commercial intercourse. Plaintiff, who held a life policy issued by defendant upon the life of her husband, paid to such general agent, in Confederate currency, the premium thereon which fell due January 2, 1862. *Held*, that this was a valid and effectual payment.

APPEAL from order of the general term of the supreme court in the first judicial department, reversing judgment in favor of defendant entered upon the report of a referee and granting a new trial. (Reported below, 59 Barb. 556; *S. C.*, *ante*, vol. 2, p. 123.)

This action was brought by the plaintiff as assignee of a policy of life insurance. The defendant issued to James Sands, of Mobile, a life policy for \$5,000 on his life, dated January 28, 1850, in which the annual premium was fixed at \$160, payable on the 18th of January in each year. The annual premiums were paid to James M. Muldon, the defendant's agent at Mobile, and were duly remitted by him to the defendant, down to and including that which became payable January 18, 1861.

On January 18, 1862, Sands paid to Muldon \$160 in Confederate notes, which the latter accepted as cash, as and for the premium on said policy which fell due on that day. Sands died on July 12, 1862; due proofs of death were furnished to the defendant August 11, 1866; they refused to pay the amount insured. The policy was duly assigned to the plaintiff before suit.

Under and by virtue of the act of Congress of July 13, 1861, and the President's proclamation of August 16, 1861, all commercial intercourse was prohibited between the citizens of the United States and the inhabitants of the State in rebellion. Both Sands and Muldon resided in Alabama; the former was not in any way connected with the rebel army or engaged in active hostilities of any kind.

Defendant, by letter dated August 21, 1861, recognized the

Sands v. The New York Life Insurance Company.

authority of Muldon to receive premiums, and directed as to the disposition thereof. This authority was cancelled some time after the receipt of the premium upon the policy in question.

The referee found that Sands and defendant became public enemies from and after August 16, 1861, and the further execution of the contract became and was unlawful, and no right accrued to plaintiff in consequence of the death of Sands. That by the war the authority of Muldon, as agent, was revoked, and the payment to him of the premium was not a payment to defendant, and ordered judgment for defendant, which was entered accordingly.

Noah Davis, for the appellant.

G. De Forrest Lord, for the respondent.

PECKHAM, J. Action to recover the amount of a policy of insurance issued by defendant to the husband of the plaintiff on the 28th of January, 1850, then a resident of Mobile, in Alabama; whereby, in consideration of \$160 then paid, and of the annual payment thereafter of a like sum during the continuance of the policy, the defendant agreed to insure him in the sum of \$5,000 "for the term of his natural life." Sands died at Mobile in July, 1862.

It is admitted that all premiums were paid on the policy up to January, 1862; and it is proved and found that the premium due in January, 1862, was paid to one Muldon, the agent of defendant at Mobile, appointed prior to our civil war, and through whom this policy was issued; and it was paid in Confederate treasury notes, then, substantially, the only currency of the so-called Confederate States for the general business of those States; and, although not made a legal tender for the payment of debts, it was so used, and was then very generally received at par in payment of debts and for the purchase of property, although it was at a discount for gold of about twenty per cent. This currency was received by Muldon, the general agent of the defendant, as money.

The defendant now objects to the payment of the insurance upon various grounds. Its counsel insist that the war made the contract void; that the contract was executory, to be renewed each year by payment of the premium or it became void; and hence such contract became utterly void by the war; that it was void as requiring commercial intercourse between the States at

war; that, at any rate, the agency of Muldon was avoided by the war. Hence, that he had no authority to receive payment of the premium in January, 1862; and certainly not in Confederate notes.

It is certainly true that all contracts with citizens of Confederate States are not made void by the war.

It is against sound principle, and at war with the lights of the age, that the debts of individuals should be impaired by national differences, — debts, be it understood, that existed by virtue of contracts made prior to the war. *Clarke v. Morey*, 10 Johns. 73.

This contract of the parties I do not think was nullified by the war. What was it? As presented in the complaint and found by the referee, it is a contract of insurance by defendant for the life of the insured for the consideration of so much money received, and the annual payment of \$160 during the continuance of the policy. It was a valid policy "for the life of the insured," to become void by the omission to pay the agreed annuity. In principle, I do not see why it is not like a lease or grant of land in fee, reserving rent, to become void if the rent be not paid, if the condition subsequent be not complied with. I do not say that it would bar the plaintiff's recovery if the contract were as the defendant insists it is. It is enough to say that such is not this contract. The agreement is to insure for the life of the assured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition subsequent, not precedent.

Is this contract criminal or illegal, as contravening the policy of the government?

If it be, if it give aid and comfort to the enemy, it is nullified by the war.

It is insisted that it is void because it intends and implies commercial intercourse between citizens of hostile States; "locomotive" intercourse, as it is termed; and, if it does, it is annulled by the war. *Woods v. Wilder*, 43 N. Y. 167; *Griswold v. Waddington*, 16 Johns. 438; *Clarke v. Morey*, 10 Ib. 69; *United States v. Grossmayer*, 9 Wall. 75.

Clearly it is not law, nor do these or any recognized authorities intend to hold that a valid debt by note, bond, or contract, existing when the war began, against a citizen of a Confederate State in favor of a citizen of a Northern State, was nullified by the war. The debt is suspended until peace returns. It is not destroyed.

Sands v. The New York Life Insurance Company.

Buchanan v. Curry, 19 Johns. 137; *Bell v. Chapman*, 10 Ib. 183; *Clarke v. Morey*, Ib. 69; *Ex parte Boussmaker*, 13 Vesey, 71; *Semmes v. Hart. Ins. Co.* 13 Wall. 158; *Prize Cases*, 2 Black, 687, per Nelson, J.; *The Protector*, 9 Wall. 687; *United States v. Wiley*, 11 Ib. 508.

Nor would it make the least difference as to the validity of the claim by contract that it was for the purchase of a farm of a citizen in a Confederate State, upon which contract large payments had been made and one or two yet remained unpaid, even though it were expressly stipulated that if the after payments were not made when due, the contract should be void, and the purchaser should forfeit, as liquidated damages, all payments theretofore made thereon.

The war would suspend such a contract until peace. *Semmes v. Hart. Fire Ins. Co.*, *supra*, and other cases.

There is no principle upon which war could annul it. This is so, irrespective of the question of real or personal estate involved. Such a contract affords no aid or comfort to the enemy.

It requires no "locomotive" intercourse, unless such intercourse be required by a bond or note past due.

The principle involved in such a contract would be the same if it contained no provision as to its becoming void, but only provided for the execution of a deed upon the payments being made as therein provided.

Yet such a contract would be nullified by the war, according to some text-books and by the *dicta* of some judges. The payments not being all made when the war commenced, there was no vested right to a deed. Some acts, therefore, remained to be done "by or between the parties during the war." Hence, they say it was abrogated by the war. One writer says it is "probably" void "as to all acts to be performed during the war." 1 Duer on Ins. 478. This was assuming to lay down a general rule after discussing *Griswold v. Waddington*, 16 Johns. 438. Some *dicta* of judges say that all *contracts* are "annulled by the war."

Authorities sustain neither position. It is really of no moment whatever whether these payments were optional with or obligatory upon the assured, as to this question. The payments were all to be made by virtue of and under a contract made before the war. Such a contract could not be nullified by the war, unless it

was hostile to the policy of the government, at war with its interests; *dicta* of judges should always be construed with reference to the case then before the court.

The general rule undoubtedly is, that it is only commercial contracts, such as give aid and comfort to the enemy, or are forbidden by, or are against the policy of the government, that are void as to all acts to be done during the war, though the contracts were made before the war.

Contracts for the insurance of the enemy's property, of affreightment, and of commercial copartnership, are avoided thereafter by the breaking out of the war, because they are inconsistent with the war, inconsistent with the interests and policy of government, whose purpose is, by the war, to destroy and cripple the enemy's property and commerce. *Furtado v. Rogers*, 3 Bos. & Pul. 191; *Kellner v. Le Mesurier*, 4 East, 395, and the two cases following; *Kershaw v. Kelsey*, 100 Mass. 561.

This last case, in an able review of the authorities, holds a lease made by a citizen of Massachusetts in a Southern State, entered into there after the war began, to be valid, and that the lessee was liable for the unpaid rent. *Clarke v. Morey*, *supra*.

The rule that makes such contracts as before alluded to void has no application to life insurance. This contemplates no commercial intercourse, no aid to the enemy's commerce, no aid or comfort to the enemy, no violation of governmental policy. It is idle to say that it fosters or implies commercial intercourse.

That money falls due annually to the defendant for the premiums, during the war, does not make the contract void any more than would instalments of debt falling due upon a bond or note, given before the war, render the bond or note void. That is not commerce or commercial intercourse.

The law does not presume that an honest debt due to an alien enemy will be paid over to him during the war, even though paid to his resident agent. *Buchanan v. Curry*, 19 J. R. 137; *Deniston v. Imbrie*, 3 Wash. C. C. 403; *Ward v. Smith*, 7 Wall. 447.

Nor is it made void by the fact that the policy itself might become payable during the war. It would be no more void for that reason than if a note or bond given before the war should so fall due. The right to receive or collect it by the representatives of the assured is suspended until peace is restored.

Why is not the note or the bond given before the war made void by the war? Simply because the interests of government do not require it. Their validity is not hostile to the government. Because it is the settled policy of government to impair, as little as possible, the private rights of citizens by national differences. *Clarke v. Morey*, 10 J. R. 69; *Bradwell v. Weeks*, 13 Johns. 1; 7 Peters, 586. That this contract of insurance cannot possibly operate in hostility to the government or its policy in the war, I think is entirely plain.

If it insured the enemy against death in the enemy's army, it would of course be void; because then, although it gave to the insured no benefit to himself, yet it gave it to his family by his death. But it insured against no such loss. An exception against such a loss would be implied in the contract as being illegal, but it is plainly expressed here. The policy provides: "If he should enter into any military or naval service whatever, or if he should die in the known violation of any law of the United States, the said policy shall be null and void."

It is insisted that men, as well as money, are necessary to the war. True; but this insurance is a direct reward to keep men out of the war. If they go in, the policy is instantly void. It may be regarded, therefore, so far as it operates at all, as a direct premium to prevent the filling up of the enemy's army. Again, it is not the purpose or policy of government to destroy mere non-combatants in the enemy's country — civilians, not belonging to the army. It is the rule of all civilized warfare to protect such persons — to shield them from injury. Then why should this insurance be condemned, as to its ultimate object?

Again, it would not be claimed that an annuity purchased from an enemy before the war, and paid for, was made void by the war, though payable any number of times during the year. Yet the difference in principle is not apparent between that and the case at bar. The only difference in form is that there the annuitant paid in full for the annuity, and receives back his annuity in instalments. Here he pays by annual instalments, and receives it back in gross by his representatives.

If it be unlawful to pay the annuity during the war, by inter-territorial intercourse, then it must not be paid in that way. But there is no pretence of avoiding such an annuity by the war, because it might, by possibility, like any other debt, be improp-

Sands v. The New York Life Insurance Company.

erly paid. See *Buchanan v. Curry*, and other cases, *supra*. Well considered cases hold that payment of these annual instalments is not like the cases made void by war of affreightment and commercial copartnership, it being a single act, or an annual act, instead of a continued business. *Clopton v. N. Y. L. Ins. Co.* 7 Bush, 199; ¹ *Hamilton v. Mut. L. Ins. Co.*,² by Justice Blatchford, in Southern District; *Manhattan L. Ins. Co. v. Warwick*, 20 Grat. 614.³ This is reasonable. But the stronger ground, in my opinion, is that the contract having been made before the war, and it being of the character before described, its fulfilment afterward is not against the purpose or policy of the war. Cases of marine insurance, of insurance against capture by the enemy on the sea, and contracts of affreightment, have no analogy to this. This contract was therefore neither illegal nor criminal.

It is urged that the last premium was not paid, and hence the policy became void. If it were not paid I do not think the consequences claimed would follow. The war suspended this contract, and no forfeiture for non-payment would arise while the war lasted, provided the premiums, with proper interest, were promptly paid on the return of peace.

It is clear that this state of things was a surprise to both parties — they made no provision for a war. If they had, it is equally clear that they would never have provided for such an inequitable result as the defendant now claims.

It is argued that these payments, at the time required, are a condition precedent to the right to the insurance, which nothing can excuse — not even an act of Providence can dispense with. Without stopping to question this position, it is clear that war in this respect, then, can accomplish what cannot be done otherwise. War extends the statute of limitations; *The Protector*, 9 Wall. 687; *Hanger v. Abbott*, 6 Ib. 532; not only against citizens, but against the United States. *U. S. v. Wiley*, 11 Wall. 508.

It is equally a condition precedent to a right to recover on a policy, that the action shall be brought within the time specified in the policy. The parties have an undoubted right, by contract, to fix a short statute of limitations, obligatory in the given case. Yet war annuls that limitation, if necessary, and the action may

¹ *Ante*, vol. 2, p. 709.

² *Post*, p. 787.

³ *Ante*, vol. 2, p. 168.

Sands v. The New York Life Insurance Company.

be brought wholly irrespective of that provision of the policy. So held in *Semmes v. Hart. Ins. Co.* 13 Wall. 158, where that was the sole point of the case. If such be its effect upon that provision, there is no reason why it shall not save from forfeiture this condition of payment of the premium when due. It is the fault of neither party that it is not paid, and war suspends contracts like this, but does not destroy them.

Nor is there any injustice to the defendant. Of course there is none in the present case, where the assured had confessedly paid for twelve years and died in six months thereafter; in fact, had paid the last premium. But justice is generally done by requiring the payments promptly after the war ceases, with proper interest. The companies do no more than invest their money upon interest. If some fail thus to pay, of course they lose all they have paid, which cannot injure the company.

Symptoms of war are usually quite plainly visible before it comes, and insurers may observe and cease to insure, so that generally a reasonable advance in premiums is made by the assured before the war comes. Cases may possibly occur where the company might lose by the failure to pay by the assured when peace is restored. In ordinary business they would be rare. But the great injustice would be generally to the assured by this forfeiture. It is sought to compare it to a commercial copartnership, to which it has no analogy. But even such a partnership is avoided only as to the future. Past transactions and liabilities are valid. But here, if this contract be made void, all past transactions are made void. The assured would lose all his payments upon the grounds claimed by the defence. But no such question arises here as the premium was paid.

The defendant had a general agent in Mobile when the payment was made, as it lawfully might, to receive the demands due the company. That it had an agent, in fact, in January, 1862, when the premium was paid, is proved and found by the referee. His continuance after the President's proclamation was expressly recognized by the defendant by letter of the 21st August, 1861. That he was lawfully defendant's agent is settled. See cases before cited; *Buchanan v. Curry*, 19 Johns. 137, where the point was involved; *Denniston v. Imbrie*, 3 Wash. C. C. 403; *Ward v. Smith*, 7 Wall. 447; *Conn v. Penn.* Pet. C. C. 524; *United States v. Grossmayer*, 9 Wall. 72; *Robinson v. Inter. Life Ins. Co.* 42 N. Y. 54; *Kershaw v. Kelsey*, 100 Mass. 561.

Hincken v. The Mutual Benefit Life Insurance Company.

It is urged, as a ground of injustice to defendant, that if the money were paid to defendant's agent at Mobile, it might and would be confiscated to the enemy's government. True, so might any debt due from an alien enemy, but that reason would not invalidate the debt. That the payment in Confederate notes was a valid payment is decided. *Robinson v. Inter. Life Ins. Co.*, *supra*; *Polglass v. Oliver*, 2 Crompt. & Jer. 15. That a contract like this was not avoided by the war is adjudged in principle in the cases cited of *Buchanan v. Curry*, 19 Johns. 137, which has never been overruled. And the following authorities are in point, to sustain this action: *Clopton v. N. Y. Life Ins. Co.* 7 Bush (Ky.), 179; *Hamilton v. M. L. Ins. Co.* 9 Blatch. 234; *Manhattan Life Ins. Co. v. Warwick*, 20 Gratt. 626. And I am not aware of any case to the contrary.

The order should be affirmed and judgment absolute rendered against defendant. All concur except GROVER, J., not voting, and RAPALLO, J., not sitting, *Judgment accordingly.*

See note to *Dillard v. Manhattan Life Ins. Co.*, *ante*, p. 548.

EDWARD HINCKEN *et al.*, respondents, *vs.* THE MUTUAL BENEFIT LIFE INSURANCE CO., appellants.

(6 Lans. 21. Supreme Court, 1872.)

Preliminary proofs. — Certain evidence that due notice and proof of death had been given, held sufficient. Such evidence, in the case of a policy payable a certain time after due notice and proof of death, is material only for the purpose of showing that the time of payment had elapsed; the policy not making them a condition precedent.

No objection having been made to the preliminary proofs of loss, and the same, though in the possession of the company, not being produced, held, evidence that no valid objection to them existed.

THE case is stated in the opinion of the court.

Alvin C. Bradley, for the appellants.

D. T. Walden & G. G. Reynolds, for the respondents.

Present: BARNARD, P. J., GILBERT, and TAPPAN, JJ.

By the Court, GILBERT, J. The action is upon a policy of life insurance. The complaint alleges that the defendant, by a policy, insured the life of Peter Rice in the sum of \$10,000, and agreed to pay that sum to his "executors, administrators, or assigns within ninety days after due notice and proof of interest, and of the death of said Peter Rice."

It avers the death of said Rice, and that the plaintiffs are the executors of his will, and then the plaintiffs further aver "that due notice and proof of the death of said Peter Rice and the interest of these plaintiffs was given to the defendant, by these plaintiffs, on or about the 18th day of September, 1866."

The answer admits that the policy was issued, sets forth matter in avoidance of it, and then follow these words: "Due notice and proof of the death of said Peter Rice and the interest of the plaintiffs was not given the defendant on or about the 18th day of September, 1866; but it is admitted that the plaintiffs are executors as stated in the complaint."

The defendant then, except as before stated, denies each and every allegation in the first and second paragraphs of the complaint.

At the trial the plaintiffs read in evidence the policy, proved the death of Peter Rice, and that verbal notice thereof was given to the defendant about two weeks after he died, by Mr. Williamson, the business partner of the deceased at the time of his death, and rested.

The defendant moved for a nonsuit, because the plaintiffs did not furnish the proofs of the death as required by the policy, and no proper notice of the death had been given.

The motion was denied, and the defendant excepted.

The defendant then recalled the plaintiffs' witness and proved by him that he delivered the preliminary proofs at the office of the company in August, 1866, and thereupon moved for a dismissal of the complaint on the ground that plaintiffs were bound to produce in evidence the proofs received, or some proofs furnishing due proof of Rice's death ninety days before suit brought. The court overruled the motion, and, no further evidence having been offered, directed a verdict for the plaintiffs.

If the case of *Wall v. Buffalo Water-works*, 18 N. Y. R. 119, had not been brought to our notice, we would have held that the answer in this case did not put in issue the averment in the complaint, that due notice and proof of the death of the assured and the interest of the plaintiffs were given, but merely denied that such notice and proof were given at the time alleged. Such was the rule of construction applied to pleadings like this before the passage of the Code of Procedure, (Gould's Pl. chap. 6, §§ 31-33,) and we think the same rule ought to be applied. But assuming

Champlin v. The Railway Passenger Assurance Company.

that the plaintiffs were bound to prove due notice and proof of the death, and of their interest, we are of opinion that the evidence given was sufficient, *prima facie*, to establish both these facts. The evidence was not necessary for the purpose of proving a performance, by the plaintiffs, of a condition precedent. The clause of the policy in question did not impose any such condition on them. The evidence was material only to show that the time of payment fixed by the policy had elapsed. The answer admitted that Rice died July 23, 1866. The witness Williamson testified that he verbally gave notice of the death of Rice, and who his executors were, at the office of the company, to a person who seemed to be in authority there, about two weeks after he died. All that remained to be done by the plaintiffs then was to show that due proof of interest and of the death had been furnished. It was proved by the defendant itself that preliminary proofs were delivered in August, 1866, at the office of the company. No objection appears ever to have been taken to these proofs. They were in the possession of the defendant. The non-production of them is satisfactory evidence that no valid objection to them existed.

If, therefore, the judge erred in refusing a nonsuit, the error was cured by the defendant supplying the evidence needed. A judgment will not be reversed for an erroneous refusal to nonsuit where the defect in the evidence is supplied by either party during the trial.

The judgment should be affirmed, with costs.

Affirmed on appeal. See *ante*, p. 711.

CHARLES G. CHAMPLIN, respondent, *vs.* THE RAILWAY PASSENGER ASSURANCE Co., appellant.

(6 Lans. 71. Supreme Court, 1872.)

Negligence. — An accident insurance company *held* liable on a policy for an accident which occurred while the insured was getting into a conveyance while in motion.

ACTION upon a policy insuring the plaintiff against accident while travelling upon any public or private conveyance. The plaintiff was injured in attempting to get on board an omnibus while in motion.

Champlin v. The Railway Passenger Assurance Company.

Varrick & Eldridge, for the appellant.

Nelson & Baker, for the respondent.

Present: GILBERT and TAPPEN, JJ.

By the Court, GILBERT, J. The general rule of law undoubtedly is, that a party is not entitled to compensation for an injury of which his own negligence or want of due care has been the primary cause. The contract of insurance, however, forms an exception to the rule. It has been repeatedly so held in England and in the United States, in relation to insurance against fire and to marine insurance. *Gates v. Madison Co. Ins. Co.* 1 Seld. 478; *Mathews v. Howard Ins. Co.* 1 Kern. 9, and authorities cited; see, also, *Breasted v. Farmer's L. & T. Co.* 4 Seld. 299. The reason given is that this contract is one of indemnity, and that one object which the assured has in view in effecting an insurance is protection against casualties occurring from this cause. The same reason applies with equal force to the contract in this case. We are, therefore, of opinion that the proximate cause of the injury only can be looked at, and that, such cause being an accident, it is within the policy.

The only remaining question is, was the plaintiff travelling when the accident happened? He was in the act of getting into a public conveyance for that purpose, and was injured while upon the outside step thereof. It would be a very strained construction of a contract like this to hold that he was not travelling. If he was not travelling it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was travelling.

The judgment should be affirmed with costs.

Judgment affirmed.

As to negligence, see *Schneider v. Provident Life Ins. Co.* 24 Wis. 28; *S. C.*, ante, vol. 1, p. 731. But see *Morel v. Mississippi Valley Life Ins. Co.* 4 Bush, 535; *S. C.*, ante, vol. 1, p. 116. As to the ruling that the plaintiff was travelling, see *Northrup v. Railway Passengers Assur. Co.* 43 N. Y. 516; *S. C.*, ante, vol. 2, p. 129; *Ripley v. Railway Pass. Assur. Co.*, post, p. 832, and note.

ALICE E. DUTTON, administratrix, &c., appellant, vs. PHILIP
WILLNER, respondent.

(52 N. Y. 312. Court of Appeals, 1873.)

Surrender of policy and renewal by agent. Violation of instructions. — D., plaintiff's intestate, having a policy of insurance upon his life, had agreed with the company for the surrender thereof, and a return to him of his premium notes held by the company, which notes had accordingly been sent to the company's agent, to be delivered up. D. intrusted the policy to defendant as his agent, with instructions to surrender the same for cancellation. Defendant surrendered the policy, but before the notes had been cancelled or surrendered applied to have the policy renewed for the benefit of himself and G. D. D. The agent thereupon returned the notes to the company, with a statement that D. wished to renew, and that defendant and G. D. D. were to help him. A renewal policy was thereupon issued for the benefit of defendant and G. D. D. The premiums were thereafter paid by defendant and G. D. D., as were also D.'s premium notes, less the amount of dividends credited thereon. G. D. D. assigned his interest to defendant, and upon the death of D. defendant collected and received the amount of the policy. In an action to compel defendant to account, *held*, (GROVER, J., dissenting,) that by accepting the renewal policy defendant must be deemed to have adopted the instrumentalities by which it was obtained, and was bound by the representation of the agent to the company; that, aside from this, defendant, while acting as agent, having acquired, by departing from his instructions, a benefit, a part of the consideration for which proceeded from his principal, plaintiff had the right to adopt his acts and to call him to account for the profits derived from the transaction.

It seems, however, that if defendant had asked and obtained the consent of his principal, in the absence of concealment or fraud, defendant might have been discharged from his obligations as agent, and might have acquired a beneficial interest in the policy.

APPEAL from judgment of the general term of the supreme court in the second judicial department, affirming a judgment in favor of defendant, entered upon the decision of the court upon trial without a jury.

This action was brought to compel defendant to account for certain moneys alleged to have been received by him as agent, and upon a policy of insurance upon the life of plaintiff's intestate, Ormond H. Dutton.

Said Dutton had a policy of insurance upon his life for \$5,000, issued by the National Life Insurance Company of Montpelier, Vt. In 1863, not desiring to continue the policy, he arranged with the company to have the same delivered up and cancelled, the company to return his notes which had been given for premiums. The company accordingly sent the notes to its agent in Boston, Mr. Phelps. Dutton handed the policy to defendant, as his agent, with instructions to surrender it under the agreement. Defendant went to Boston and surrendered the policy, but before

Dutton v. Willner.

the premium notes were given up it was arranged with the agent that the policy should be renewed for the benefit of defendant, and George D. Dutton. The agent thereupon returned the notes to the company with a letter stating that "Mr. Dutton wants to renew. His friends, G. D. Dutton and Philip Willner are to help him."

Upon the receipt of this letter the company issued a new policy bearing the same number, and in every respect similar to the old policy, save in date, and that it was stated therein to be "for the benefit of George D. Dutton and Philip Willner," and the following clause was added: "This policy is subject to all the liabilities and entitled to all the benefits of original policy, No. 1,394." Of this transaction O. H. Dutton was not advised. The premiums were thereafter paid by defendant and George D. Dutton, and in 1865 they paid the premium notes, the company crediting thereon the dividends then accruing. In 1867, defendant purchased the interest of George D. Dutton in the policy, and thereupon surrendered the same to the company, receiving another, identical in every respect save that it was for his benefit alone.

Defendant paid the premiums thereon until the death of the assured, and then collected from the company the amount of the policy and dividends thereon. The court found as conclusions of law that by the surrender and cancelling of the original policy the assured surrendered all his right, title, and interest therein, and had no interest in the subsequent policies. That defendant did not act as agent in procuring said policies and was entitled to all the benefits of the last policy in his own right, and that defendant was entitled to judgment, which was entered accordingly.

Mason W. Tyler, for the appellant.

Samuel Hand, for the respondent.

RAPALLO, J. It is very clear that the policy upon which the defendant collected the money in dispute in this action was a renewal or reissue of the original policy, No. 1,394, upon the life of O. H. Dutton, which had been intrusted by him to the defendant for the purpose of being cancelled. After the surrender of the original policy by the defendant to the insurance company, but before the notes of O. H. Dutton securing the payment of one half the premium had been cancelled or surrendered, and while they were in the hands of Mr. Phelps, the defendant and

George D. Dutton (through George D. Dutton) applied to Mr. Phelps to have a policy issued for their benefit. In pursuance of this application, Mr. Phelps wrote to the company, which was located in Vermont, the letter set forth in the findings, inclosing to the company the notes of O. H. Dutton, and stating that he (O. H. Dutton) wanted to renew his policy, and that his friends George D. Dutton and Philip Willner were to help him, and requesting the company, if it was willing to renew the policy, to make it payable to them, or for their benefit, and that they would see that the policy was kept up.

In response to that letter, the company issued and sent to Phelps the policy of July 28, 1863, which was delivered by Phelps to Dutton. This policy shows upon its face that it was a reissue of the original policy, No. 1,394. It acknowledges the receipt of the premium from O. H. Dutton; states that he is the assured; insures his life in the sum of \$5,000 for the benefit of George D. Dutton and Philip Willner, and states that it is subject to all the liabilities and entitled to all the benefits of original policy, No. 1,394.

The company retained the notes of O. H. Dutton which had been given to secure the premiums on policy No. 1,394, and continued to hold them until 1864, when they were paid in part by dividends from 1860 to 1864 on the original policy No. 1,394, and on the reissue of it, and in part by cash paid by G. D. Dutton and the defendant, and were afterward surrendered to the defendant. It does not appear that they were even [ever?] surrendered to O. H. Dutton.

After the death of G. D. Dutton, the defendant, having purchased his interest in the policy, procured a second reissue, in all respects like that of July 28, 1863, except that it purported to be for the benefit of Willner alone, instead of Dutton and Willner.

The substance of the whole transaction, stripping it of immaterial matter, is, therefore, that the defendant having undertaken to act as the agent of O. H. Dutton, for the purpose of having his policy cancelled, and thus relieving him from further liability for premiums or on his premium notes, instead of doing so, agreed with the company to continue the policy for the benefit of himself and his associate G. D. Dutton, leaving the premium notes of O. H. Dutton in the hands of the company uncanceled, and his principal exposed to the risk of being called upon for their payment in case of the insolvency of the company.

It is not difficult to see the advantages gained by the defendant and his associate, by making this use of the position in which he was placed by his agency. If he had applied to the company on his own account for an original insurance upon the life of O. H. Dutton, he would have been obliged to pay the increased rate of premium resulting from the addition of upwards of five years to the age of the assured. By continuing or obtaining the reissue of the original policy, he secured the lower rate of premium, subject only to the payment of the outstanding notes of O. H. Dutton, and as against these he had the benefit of the dividends or return premium, accruing by virtue of the old policy upon the cash payments which O. H. Dutton had made during the past five years and upwards.

The liberality of the company in thus apparently allowing a third party to insure on such exceptionally favorable terms is explained by the letter of Mr. Phelps, by which the company was induced to make the renewal or reissue. By this letter it was represented to the company that the renewal was requested by O. H. Dutton, the party equitably entitled to these benefits, and that the defendant and G. D. Dutton were acting only in the capacity of his friends. Justice to the defendant requires that it should be clearly stated that there is nothing in the case which would warrant even an intimation that he had actual knowledge of the contents of this letter. If he had had such knowledge and subsequently accepted the reissued policy, the case would be too clear for discussion, and it cannot be presumed that he would have laid claim to the proceeds of the policy. *Morton v. Tewart*, 2 Y. & Col. Chy. 67. But the legal rights and liabilities of parties are often affected by the acts and representations of others of which they had no knowledge, where they have received the benefit of the contracts induced by such acts or representations. In this case it was the representation of Phelps that the renewal of the policy was requested in behalf of O. H. Dutton, which brought the renewal. It is not to be presumed that the company would have granted it, had they not been led to suppose that O. H. Dutton desired to retract his proposition to cancel the insurance. When O. H. Dutton's notes, which had been sent to Mr. Phelps for the purpose of consummating the cancellation of the insurance, were returned to the company, it must have supposed that this was done with the consent of O. H. Dutton, and not

Dutton v. Willner.

that other parties were using these notes for their own benefit without his authority. The letter of Phelps was written in consequence of the application of G. D. Dutton to him to procure a policy. G. D. Dutton made the application on behalf of himself and the defendant. Phelps was, therefore, the agent of G. D. Dutton and the defendant to procure the policy from the company. He had no power to issue it himself. When it came they accepted it, and saw from its contents that it was a renewal or reissue of the old policy, and by accepting it they must be deemed to have adopted the instrumentalities by which it was obtained, to the extent at least to which their right to the policy might be affected by the means employed by their agent to obtain it, even though innocent of any complicity in those means. *Veazie v. Williams*, 8 How. U. S. 134; *Dexter v. Adams*, 2 Denio, 646; *Bennett v. Judson*, 21 N. Y. 238; Story on Agency, § 419; Dunlap's Paley on Agency, p. 325.

The application of this principle leads to the result that the defendant can have no greater claim to the proceeds of the policy than he could have if he had, while acting as the agent of O. H. Dutton to procure the cancellation of the contract, obtained a renewal of it payable to himself, on the representation that he was acting as the friend of O. H. Dutton and at his request, and had used for that purpose the notes of O. H. Dutton, which he knew his principal desired cancelled.

But, aside from the considerations growing out of the letter of Phelps, and treating the case as if the application for a reissue had been made by the defendant directly to the company, without any representation that he was acting in behalf of O. H. Dutton in obtaining the renewal, then the question arises whether the defendant can, under the general rules of law governing the relations between principal and agent, retain the benefit of this transaction.

It is a well settled and salutary rule that "a person who undertakes to act for another in any matter shall not, in the same matter, act for himself." It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that the agent must, at the option of his principal, account to him for any profit he may have made by the

transaction. It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject matter of his agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended not merely to afford a remedy for discovered frauds, but to reach those which may be concealed; and also to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates. *Keech v. Sandford*, 3 Eq. Cases Abr. 741; *York Buildings Co. v. McKenzie*, 8 Bro. Par. C. (Toml. ed.) App., 42, and 3 Paton, 378; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Cumb. C. and I. Co. v. Sherman*, 30 Barb. 553, and authorities cited; *Moore v. Moore*, 5 N. Y. 256; *Gardner v. Ogden*, 22 Ib. 327; *Ringo v. Binns*, 10 Peters, 269. All profits, and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty of agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal. Dunlap's Paley on Agency, 51; Story on Agency, §§ 207, 211, 214; *Bartholomew v. Leach*, 7 Watts, 472; *Campbell v. Penn. Life Ins. Co.* 2 Whart. 64; *Taylor v. Knox*, 1 Dana, 395.

The defendant in this case admits in his answer "that O. H. Dutton requested the defendant, as his agent, to surrender the policy of insurance for cancellation, and intrusted him with the same for that purpose," and the same fact is found by the court.

It was by being thus intrusted with the policy, as agent of O. H. Dutton, that the defendant was brought into relations with the company and enabled to make the arrangement which he finally did. The policy belonged to O. H. Dutton, and all profits resulting from it, though acquired by his agent by departing from the instructions given him, also belonged to the principal.

In substance, the defendant, instead of cancelling the policy renewed it without the knowledge of his principal, and had it made payable to himself and G. D. Dutton, deriving from such renewal much greater advantages than he could have derived from an original application on his own behalf for a policy on the life of O. H. Dutton, and ultimately receiving the proceeds of the renewal. It is contended that before obtaining the renewal or reissue, the defendant had* executed the power conferred upon him by O. H. Dutton by surrendering the original policy. That when that had been done all interest of O. H. Dutton in the matter had terminated, and the defendant was at liberty to make whatever contract he pleased with the insurance company for his own benefit. This argument is too transparent to conceal the real nature of the transaction. It is true that the defendant did at one time physically surrender the policy, and at that time he no doubt intended to carry out the instructions of his principal. The premium notes were thereupon sent by the company to Mr. Phelps for the purpose of being surrendered, and the defendant must have known that one of the purposes of his principal in surrendering the policy was to extinguish those notes, and that to consummate the matter they should be delivered up. But while the notes were still in the hands of Phelps uncanceled, and the matter thus capable of reconsideration, the defendant, at the instigation of George D. Dutton, consented to undo so much as he had previously done in pursuance of his agency, and to accept a reissue of the policy for the benefit of himself and G. D. Dutton, giving them in terms the benefit of the original policy, and consequently of the payments which O. H. Dutton had previously made thereon, and leaving his notes outstanding in the hands of the company as security for the unpaid premiums. It is plain that the new policy thus obtained was a mere substitute for or continuation of the surrendered one, and not a new and independent contract. If, on the surrender of the original policy, the company had paid a sum of money to the defendant by reason thereof, no one would question that he must account for it to his principal, though the principal had authorized him to surrender it for nothing. Instead of a sum of money the company gave the defendant a contract, part of the consideration of which proceeded from his principal, and out of which the defendant has realized a considerable amount. On what principle can the agent retain

this benefit with any greater show of right than he could a direct payment? The consideration for it was in part the policy with which he had been intrusted by his principal, and in part the notes of his principal, which, as he well knew, ought to have been extinguished. The fact that in addition to these the agent contributed some of his own funds gives him no right except that of reimbursement of what he has contributed.

It is said that O. H. Dutton sustained no prejudice by the renewal of the policy and the redelivery of his notes to the company, for the reason that the acceptance by the company of the surrender of the original policy would have been a good defence to the notes. Whether or not this defence would have been available it is not necessary to inquire. The notes being left outstanding as apparently valid securities, and the consequent exposure to an action, and to the necessity of defending it, would be some prejudice. The defendant took up the notes after the lapse of a year or more, availing himself of them in the mean time to obtain credit for the unpaid premiums accrued on the policy, and it hardly lies in his mouth to say that they were not valid obligations. But, as before remarked, it was not necessary that the principal should have been prejudiced. If the agent made a profit out of the transaction he is bound to account for it, though made without the knowledge or authority of the principal, and without risk or expense to him.

If, when it was proposed to the defendant to renew the policy for the benefit of himself and G. D. Dutton, the defendant had asked the consent of O. H. Dutton so to do, and to use his notes for the purpose, and such consent had been voluntarily given, then, in the absence of any misrepresentation, concealment, or fraud, the defendant might have been discharged from his obligations as agent, and might have acquired a beneficial interest in the policy. See *Ex parte Lacey*, 6 Ves. 625. But no such consent having been asked, and the transaction having been kept secret from O. H. Dutton during the residue of his lifetime, the defendant's relation as agent in the matter did not terminate, and the plaintiff has the right to adopt his acts, and call him to an account for the profits he has derived from the transaction.

The state of the accounts between O. H. Dutton and the estate of his father, or between him and the plaintiff, can have no bearing upon the case. The policy was not pledged for any debt;

Dutton v. Willner.

and if any is due to the defendant, it is not a lien on the proceeds of the policy.

The defendant is entitled to credit for all payments necessarily made to preserve the policy.

The residue he must be deemed to have received in trust for the legal representatives of O. H. Dutton, deceased.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

All concur, except GROVER, J., dissenting, and ALLEN, J., not voting.

Judgment reversed.

See *Gray v. Murray*, 3 Johns. Ch. 167; *S. C.*, ante, vol. 2, p. 91; *Soule v. Union Bank*, 45 Barb. 111.

PENNSYLVANIA.

MECKE vs. THE LIFE INSURANCE COMPANY OF NEW YORK.

(8 Phila. 6. District Court, 1870.)

Disaffirming contract. — A man who effects an insurance upon his life, through an agent of an insurance company, and accepts from the company a policy of insurance agreeing in all respects with the proposal signed by the insured, and transmitted by the agent to the company, and who retains possession of the policy, and pays a second premium thereon without objection, cannot afterwards be permitted to disaffirm the contract, and to recover back the premiums upon proof that the agent, at the time the proposals were made and the first premium paid, agreed, in consideration of the premium, to procure for him a policy of a different kind; and that the general agent of the company, when the policy was delivered and complaint made that it was not in proper form, promised that the company would make it all right.

RULE for a new trial.

THAYER, J. The plaintiff, a resident of Philadelphia, being desirous of effecting an insurance upon his life, negotiated with an agent of the defendants, whose business it was to solicit risks. The agent told him that the company would give him an endowment policy, which, after the payment of two premiums, would be non-forfeitable. The premium being agreed upon, an application for a policy was signed by the plaintiff, who, in the afternoon of the same day, gave the soliciting agent a check for the premium, who thereupon procured from the resident general agent of the company a receipt for the same, which was delivered to the plaintiff.

The application, which was a blank form filled up in the handwriting of the plaintiff, and by him signed, was an application in the ordinary form, containing no allusion to a non-forfeitable policy. On the same day the plaintiff went to Pittsburg. Upon his return, after an interval of ten days, he found at his counting-house the policy of insurance for \$5,000, which had been executed by the company, and transmitted to him in his absence. Upon reading it, he saw that it contained no clause to give it the character of a non-forfeitable policy. He thereupon took it to the resident general agent of the company, and told him it was not the kind of policy which he had contracted for; that the soliciting agent had promised to give a policy non-forfeitable after two premiums had been paid. The general agent said that the

Mecke v. The Life Insurance Company of New York.

company would make it all right, and the plaintiff then went away, retaining the policy in his possession, the date of which was September 22, 1865. The date of the written application was September 20, 1865.

Things remained in this condition until the second annual premium became due, in 1866, which was paid by the plaintiff without any objection to the form of the policy, which he had held for a year, and without any notice to the company that he had demanded anything more, and the usual receipt was given for the payment. In 1867 the plaintiff, finding it inconvenient to continue the payment of the premiums, renewed his demand for a non-forfeitable policy, which the defendants refusing to give him, he thereupon brought this action against them, in which he claimed to recover back the premiums which he had paid. There were also counts in his declaration upon a contract to give the plaintiff a non-forfeitable policy.

Upon the trial the jury were instructed by the court that there could be no recovery upon the last-mentioned counts, because there was no evidence of any such contract. It had been proved that the agent had no authority to make any such contract for the company. His only authority was to receive and forward proposals for insurance to his principals, which proposals being in writing, and being (with the policy) the only evidence of any binding contract which the company had entered into with the plaintiff, they could not be enlarged or altered by any parol statements of the agent, whose only business was to receive the proposals and transmit them to the company.

With reference to the claim for a return of the premiums paid, the jury were instructed that if the plaintiff had paid the premium to the agent before receiving his policy, in consequence of a promise on the part of the agent that he would procure for him a non-forfeitable policy, and if the company had received the premium and sent the plaintiff a policy of a different description, he would be entitled, upon returning the policy with reasonable diligence, to a return of the premium from the company, upon the ground that it was money paid under a mistake, or upon a consideration which had failed. And the jury were also told that if upon promptly representing to the resident general agent the circumstances of the case, he had been assured that the company would make it all right, that was a lawful excuse for not return-

ing the policy immediately, and justified the plaintiff in waiting a reasonable time for the performance of that promise before making a demand for the return of the premium. But if that promise of the general agent was not performed within a reasonable time, then it was the imperative duty of the plaintiff to inform the company of it, and to return the policy which he held, otherwise he could not demand the return of the premium paid. That if he acquiesced in the existing state of things — nay, if he failed to inform the company with reasonable diligence that he did not acquiesce, and to return the policy, or to offer to return it, then he could not recover, because having subjected the company to the risk for a time, and having occupied, as regarded them, in all respects the position of a person insured, with the evidence of their contract as insurers in his possession, he could not afterwards be allowed to return to his original position, and claim a return of the premium, upon their refusal of a policy of a different kind. In regard to the payment of the second annual premium, the jury were told that if the plaintiff had paid the premium without objection, and without any demand for a non-forfeitable policy, it was a circumstance very strong in its character going to show that he had acquiesced in the form of the policy which he held. Indeed, that it was a circumstance so strong that without proof of any explanatory or qualifying circumstances, it was in law a ratification and acceptance of the policy, in its existing form, which precluded him from receiving back the premiums.

We think these instructions correctly defined the position and relative rights of the parties under the circumstances which were disclosed in the evidence. The jury saw fit to find a verdict for the plaintiff. But upon the evidence which was given at the trial, we cannot allow it to stand without permitting them to overturn the principles of law by which the rights of the parties are to be determined. It was distinctly proved that the plaintiff had retained the policy in his possession for more than two years; that he had paid the second annual premium without objection, and had only demanded from the company a return of the premiums when the third annual premium was about to fall due, and it became apparent that, owing to adverse circumstances in his business affairs it would be impossible for him to continue to pay them. To allow him, under these circumstances, to repudi-

Estate of Henry Trough.

ate the contract and to recover back the premiums, would be to give him the benefit of the contract during his own pleasure, and to permit him to disaffirm it whenever he might choose to do so, and recover back the consideration which had induced the defendants to enter into it. Originally he might have abandoned the contract and treated it as a nullity, and claimed the consideration. But having made his election to treat the policy which he received as a subsisting contract, and having thereby imposed the risk upon the defendants for two years, it was afterwards too late for him to adopt the other course. Men cannot, by their own conduct and negligence, impose burdens upon those with whom they deal, and then claim to stand in the position of persons who, in the assertion of their own rights, have been mindful of their obligations to others.

Rule absolute.

ESTATE OF HENRY TROUGH.

(8 Phila. 214. Orphans' Court, 1871.)

Assignment. — A life insurance policy, by writing under seal duly acknowledged, was assigned to H. in trust for assignor's children ; it was not delivered in person to H., but placed in the safe of a firm of which assignor was a member and found there upon his death : *Held*, a valid trust as against creditors, assignor being solvent at date of assignment.

EXCEPTION to auditor's report.

ALLISON, P. J. Henry Trough, in his lifetime, effected a policy of insurance on his life for the sum of \$3,000, in the Royal Insurance Company of Liverpool.

On the 17th of May, 1861, he assigned the policy by writing under seal, for the consideration of one dollar, as well as the consideration of natural love and affection, to John W. Hicks, in trust for certain of his children ; the interest to be applied to their support and maintenance during minority, the principal to be paid to them when married or on attaining the age of twenty-one years.

On the same day the instrument was acknowledged before an alderman, and after the death of Mr. Trough, about seven years after the execution of the assignment, it was found in the safe of the firm, of which decedent was a member.

The assignment of the policy and the declaration of trust was never delivered in person to John W. Hicks, but on the back of

the envelope, in which the assignment was inclosed, was indorsed the name and residence of Mr. Hicks, with the added words, "Please send this to him after my death."

It is admitted that Mr. Trough was solvent on the 17th of May, 1861, and that before his death he became insolvent.

The deed of assignment and declaration of trust the auditor declared to be invalid, because it was not delivered to the assignee and trustee. To this ruling exception is taken on behalf of the children of decedent by Mr. Hicks.

The auditor relies on *Plumstead's Appeal*, 4 S. & R. 545, to support his conclusion; but the only question which was considered or decided by the court in that case was, whether envelopes containing bonds and a certificate of bank stock, one indorsed by the decedent "for R. H.," and another "for the heirs of G. P.," constituted a valid testamentary disposition of the property; and whether the papers could be proved as a will in writing.

This was decided by the supreme court in the negative; for the reason that there was nothing marking an intention to dispose of the property as by a will, or that the securities *after her death* should go to the persons whose names were written on the envelope; that there were no legatory words, denoting a legatory donation.

In the papers before us, almost every essential element that was declared to be wanting in *Plumstead's Appeal* exists; here the intention of Mr. Trough is expressed in writing; his name is signed at the end thereof, and it was designed to take effect at his death; and yet it has not been pretended that this instrument could be maintained as a last will. But the exceptant does claim that it constitutes a valid trust; citing in support of this claim *Crawford's Appeal*, 11 P. F. Smith, 53. In that case a husband said to his wife, "I have added \$3,000 to your little money;" no money was seen by or delivered to the wife; nor did she receive any part of the interest as it became due, but by the direction of the husband, his clerk credited her on his books with \$3,000, and added the credit of interest from time to time. The court held that this afforded ample evidence of an executed gift, followed by an express trust. There was no actual delivery of the money; nothing but the credits on the books, and the setting apart, which appeared in this form only, was held to be equivalent to delivery to the wife, or to some person for her benefit, and to imply a trust binding on him and on his estate.

Estate of Henry Trough.

Raybold v. Raybold, 8 Harris, 308, was also relied on by exceptant. The declaration of the decedent indorsed in writing on the back of a deed, conveying property to him in his own name, that he held the property for the wife of his brother, and that he would convey it to her or to her nominee whenever directed so to do, was decided to constitute a trust for the sister-in-law, and a conveyance to her was decreed. The present case is stronger upon its facts than *Crawford's Appeal*, or *Raybold v. Raybold*; the policy of insurance is not set apart by parol declaration merely, but with all due formality is assigned by instrument under seal, which imports a consideration and an express trust declared for the children of Mr. Trough. The court in *Crawford's Appeal* cite in support of their conclusion, *Herr's Appeal*, 5 W. & S. 494; there the subject of the gift was money, unaccompanied with any declaration amounting to an express trust. The money was kept in a trunk to which the husband had access at all times, and to which he often went alone, and thus it was subject to his dominion. There was no formal delivery to his wife; no counting of the money; no particular sum was stated by him; but his general declaration was that the money was his wife's, and it was in proof, that is [it?] was separated from the remaining contents of the trunk by a false bottom. The case, therefore, depended on the setting apart of the money for the wife, and on the verbal declarations of the husband; during all this time it was in his possession and subject to his control. This was sustained as a gift by the husband to the wife, and as it was not in fraud of creditors, it was held valid in equity, without the interposition of a trustee. Gibson, C. J., remarking, such a gift would certainly be void at law, because of the unity of possession of husband and wife, the inability of the wife to contract with her husband, and because she could not receive from him that delivery and transfer of the money which is essential to this species of contract.

If *Herr's Appeal* was sustained of a gift to the wife that equity would enforce for her benefit, with much more reason may it be invoked to sustain a contract of transfer of a policy of life insurance, having a valuable as well as a good consideration to support it, with a trustee to take, and a formal trust declared.

Actual delivery to the trustee under the circumstances of this case we do not deem to be essential, because there was a con-

structive delivery of the instrument after it had been executed, placing it in the possession, and making it subject to the control of the partners of Mr. Trough, by depositing it in the firm safe, with a direction in writing, which could have been intended for, or directed to no person other than his partners, none others having access to the safe.

We regard this as equivalent to placing the paper in their hands, and saying to them, — After I am dead give this to the trustee. Their possession, therefore, may be held to be the possession of Mr. Hicks, who now claims the money for his *cestuis que trust*. If it be objected to this view, that the possession remained in Mr. Trough also, because the safe was his property as well as the property of his partners, the answer is, that his declaration indorsed on the envelope showed a purpose to put it aside or deliver it to his partners, to be kept by them till the proper time should arrive to hand it over; and that such a joint possession is not inconsistent with a setting apart to them is, we think, supported by both *Crawford's Appeal* and *Herr's Appeal*. In the first case it was nothing more than the entry upon the books of decedent; and in the second case it was the parting the money in a trunk, to which both husband and wife had access. In *Crawford's Appeal* there was not even a parting of money or a joint possession. We are for these reasons prepared to hold, that the acts of Mr. Trough constituted a delivery which would sustain the deed, as an instrument handed over, or delivered after execution; it is quite as strong as leaving a deed with a magistrate, after acknowledgment, with the remark that it was for the grantee, which was held to be a good delivery. Or that it is a legal gift, executed by such a delivery as passed the title from Mr. Trough to the assignee. Or because it has a sufficient consideration to support it, and is under seal, it is a binding agreement, which equity will support, for the benefit of those who take under the deed.

This case differs from those above cited in this, that creditors claim as against the trustee. But the auditor finds as admitted fact, that when the deed was executed Mr. Trough was solvent; and though it is not stated in the paper book at what time he became insolvent, it was remarked on the argument, and not denied, that it was a short time before his death, which took place

about seven years after the 17th of May, 1861, and that the insolvency was sudden and unexpected.

There is nothing to call in question the honesty and good faith of the transaction, nor is the provision, which by the assignment was made for certain of the children of the assignor, unreasonable; nor was it made in contemplation of insolvency, or with an intent to defraud creditors. That a provision for children under such circumstances is valid ought not, under the settled law, to be questioned. So far from the law condemning such deeds as void, post-nuptial settlements even are supported in equity without the intervention of a trustee. When they are fairly made, and the provision is reasonable, the husband not being in debt at the time, and they are free from any badge of fraudulent intent, they will be upheld; and what a husband may do for his wife a father may certainly do for his children. See for general doctrine under this head, *Larkin v. McMullin*, 13 Wright, 34; *Coates v. Gerlach*, 8 Wright, 45; *Mullen v. Wilson*, 8 Wright, 416.

I think the only possible claim the creditors could sustain in the premises, would be for the amount of premiums paid by Trough to keep the policy alive, after he became insolvent. Whatever sum of money was appropriated by him to secure this end, which was of right the money of his creditors, ought to be taken from the fund in dispute, and returned to them now; but this does not give to creditors any just claim to the remaining part of the \$3,000.

The exception to the report of the auditor is sustained, and the matter will, upon application, be referred back for adjustment, upon the principle stated, unless the parties can agree upon the amount to be deducted.

D. W. Sellers & W. F. Johnson, for the exceptions.

H. E. Hayward & William S. Price, contra.

The North American Life and Accident Insurance Company v. Burroughs.

THE NORTH AMERICAN LIFE AND ACCIDENT INSURANCE
Co. vs. BURROUGHS.

(69 Penn. St. 43. Supreme Court, 1871.)

Accident insurance. Proof of death.—An accident policy of insurance stipulated that no payment in case of accidental death should be made, unless notice of the injury and death should be given within thirty days of the happening of either, and sufficient proof furnished the company of such injury, and that the death was caused solely by such injury, and ensued within three months from the happening thereof. Written notice was given that the death was from “an injury received in the bowels, while working in a hay-field, producing peritoneal inflammation.” Proof was subsequently furnished by affidavit of the physician, that deceased “was killed by accident, and that the accident was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles, producing peritoneal inflammation,” &c. This notice and affidavit made out a *prima facie* case of death from injury resulting from accident.

An *accidental strain*, resulting in death, is an accidental injury within the meaning of the policy.

Variance.—The widow, for whose benefit the insurance was made, in her affidavit stated that the injury happened while the deceased “was unloading hay, when he accidentally strained himself;” the affidavit of the physician stated the death was “from an accident by exertions in hauling in hay;” the proof on the trial was that the injury was from a blow from a pitchfork while hauling in hay. *Held*, that the variance was immaterial.

Change of occupation.—In his application, the assured stated his occupation to be an “earthen-ware manufacturer;” there was no evidence that he had changed his occupation, but the proof was that he, while on a visit at a farm, had assisted in loading hay and there received his death injury: *Held*, that this was not a change of occupation within the meaning of the policy.

BEFORE Thompson, C. J., Agnew, Sharswood, and Williams,
JJ. Read, J., at nisi prius.

Certificate from nisi prius. No. 221, to January term, 1871.

This was an action of debt, commenced December 4th, 1868, by Anna L. Burroughs, against the North American Life and Accident Insurance Company, (formerly the North American Transit Insurance Company,) to recover the amount of an insurance on her husband, Garrett S. Burroughs, from death by accident. The policy was dated December 13th, 1866, and insured “Garrett S. Burroughs, in the sum of \$5,000, to be paid to Anna L. Burroughs, . . . in case of death resulting within twelve months from the date of this policy in consequence of accident. . . .

“*Provided always*, That no payment shall be due, and no claim be made, under this policy by any one on account of such accidental loss of life of the assured, unless notice of such injury and of such death shall be given to the company within thirty days after the happening of either, and sufficient proof furnished said company of such injury, and that such death was caused

The North American Life and Accident Insurance Company v. Burroughs.

solely by such accidental injury, and ensued within three months from the happening thereof.

“*And provided further*, That this insurance shall not extend to, or cover, or embrace, any death caused by natural disease, surgical operation, unreasonable imprudence.”

Amongst the conditions were these : —

2. For the purpose of identification, notice must be given in writing to the company, at its office in Philadelphia, by the party insured, of any change of residence, name, *occupation, or business*.

3. In the event of any change of avocation, occupation, or business, either the policy shall be cancelled and the proportion of the premium for the unexpired term returned, or the difference for the extra hazard repaid by the assured and indorsed on the policy ; otherwise this policy shall be null and void.

4. In case of injury producing death of the assured, happening as aforesaid by accident, within the meaning of this policy, the party for whose benefit the insurance is made shall, within thirty days thereafter, give notice of the same in writing, with sufficient proof of such injury and of death.

In his application for insurance the deceased stated that his “profession or occupation,” was “earthen-ware manufacturer.”

On the 12th of August, 1867, the company received the following notices : —

“To THE NORTH AMERICAN TRANSIT INSURANCE COMPANY, No. 133 South Fourth Street, Philadelphia, Penn.

“You are hereby notified, that Garrett S. Burroughs, of Trenton, New Jersey, who was insured in your company, policy No. 10,980, issued December 13th, 1866, came to his death by accident on the 14th day of July last.

“ANNA L. BURROUGHS.”

“PENNINGTON, *August 10th*, 1867.

“This is to certify, that Garrett S. Burroughs came to his death by an injury received in the bowels while working in a hay-field, producing peritoneal inflammation, which resulted fatally. “HENRY P. WELLING, *Attending Physician*.”

They also received the following affidavits : —

“Anna L. Burroughs, of Trenton, being duly sworn, deposes and says that she is the widow of G. S. Burroughs, of Trenton,

New Jersey, now deceased ; that said deceased was the identical person whose life was assured against death by *accident* in the North American Transit Insurance Company, under policy No. 10,980, bearing date the 13th day of December, A. D. 1866 ; and that her late husband died in consequence of an *accident* which happened on the 9th day of July, A. D. 1867, on this wise : said deceased, on the day aforesaid, was assisting in unloading hay in Hopewell township, New Jersey, at his grandfather's, (where he had gone on a visit,) when he accidentally strained himself. He immediately complained of severe pain, and a physician was summoned. All was done for his relief and recovery that could be, without success. He lingered till the 14th of said month, when he died, and the said *accident* was the direct cause of his death.

“ ANNA L. BURROUGHS.

“ Sworn and subscribed, &c., this 4th day of September, A. D. 1867.”

“ Henry P. Welling, of Pennington, being duly sworn, deposes and says, that he is a practising physician and a graduate of Pennsylvania University, and in regular practice in Pennington ; that he personally knew the late G. S. Burroughs, of Trenton, and knows that he was killed by *accident* on the 14th day of July last ; and further, that the *accident* was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles, and produced peritoneal inflammation and all its concomitant symptoms, which resulted in his death on the 14th day of July last.

“ HENRY P. WELLING, *Attending Physician*.

“ Sworn and subscribed to, &c., this 23d day of August, A. D. 1867.”

The cause was tried at nisi prius, March 16th, 1870, before Mr. Justice Read.

The plaintiff testified that “ she and her husband had gone from their residence, in Trenton, on a visit to his grandfather's, on the 4th of July, 1867. On the 9th he went out to assist with getting in the hay ; he had been in perfect health, and was in good health at the time. . . . He came in a little before dinner ; he was in a great deal of pain. . . . We sent for the doctor who came in about two hours.”

On cross-examination, she said : “ My husband was secretary

The North American Life and Accident Insurance Company v. Burroughs.

and treasurer of Port Richmond Pottery Company, and had charge of the manufacturing ; the company was still going on, but he had left two or three weeks previously ; he was still living in Trenton all the time, and was not in any business at the time the accident occurred."

The following letter from the president of the company to her, being shown to witness, she said : " This letter was received ; I do not remember making any reply. That letter was the only objection, I remember."

" September 14th, 1867.

" Mrs. ANNA BURROUGHS : —

" Dear Madam, — Your claim made against this company for \$5,000, on account of husband's death, is duly received. I have examined the case thoroughly in all its bearings, and cannot discover that your husband died as the result of any injury received by accident. The doctor certifies that he died in consequence of peritoneal inflammation. No accident happened ; no injury was received ; no outward and visible sign was apparent. The man took sick, gradually grew worse, and five days after he died. He may, perhaps, have been guilty of some imprudence ; but his voluntary assumption of unnecessary labor cannot by any possibility be construed into an accident. We therefore decline to pay the claim."

Dr. H. P. Welling testified for the plaintiff, that on the 9th of July he was called in to see Mr. Burroughs, and found him with great pain in the bowels ; found an enlargement on one side ; saw no bruise. Witness further described the symptoms, and continued : —

" I was there two or three hours, and attended every day two or three times till he died. I did not see the accident. His death resulted from accident ; the inflammation resulted from injury received in the bowels, produced peritoneal inflammation. That is frequently consequent upon a blow. I should say that it was the result of something external. The symptoms agreed with what I learned of the accident. . . . He told me he had been pitching hay, and the fork-handle slipped through his hand and struck him on his bowels. I inquired what produced pain, and he told me this, and I found swelling just where he said. . . . The symptoms were consistent with this."

Dr. Samuel Murphey testified : " Peritonitis may result from

The North American Life and Accident Insurance Company v. Burroughs.

such a blow as described by Dr. Welling. It is an inflammation of the external coating of the bowels. I suppose it may have been produced by the blow."

Dr. Joseph Koerper testified about as Dr. Murphey.

The plaintiff gave other evidence to maintain her case, and closed.

For the defendants, T. W. Lawford, their solicitor, testified: "Burroughs was a master manufacturer in a pottery. He did not do any labor; he was taken as a preferred risk, as not being engaged in manual labor; he satisfied me he was not engaged in manual labor and I took the risk."

Physicians called by defendants testified in substance that in their opinion, from the description of the symptoms, the disease and cause of Mr. Burroughs' death was not that stated by Dr. Welling; and that he could not have told without a *post mortem* examination what occasioned the death.

Mr. Paxson, an officer of the company, who went to inquire of Dr. Welling into the cause of the death, testified that the Doctor "made no mention of the blow. He said he was suffering from inflammation, from straining the abdominal muscles."

Dr. Woodruff testified that the plaintiff told him that Dr. Welling had said he did not think so much of the blow as the strain.

The following were defendants' points with their answers: —

1. The deceased having been insured as an earthen-ware manufacturer, and a preferred risk, could not change his occupation and engage in the labor of assisting in loading and unloading hay, without rendering his policy null and void.

Answer: "The objection is, that there is no such evidence that he changed his occupation. There is no evidence that he was engaged as a farmer. The only evidence is, that he goes to his grandfather's place, and, having been on a farm in early life, he turns to and helps to load hay. I cannot therefore charge that: it is out of the question. I refuse it in the terms as it is made."

3. Unless the jury shall find that the death of the assured was caused solely by straining or injury of the abdominal muscles, and that such straining or injury was not the result of unreasonable imprudence, their verdict must be for the defendants.

Answer: "I cannot so charge. I have charged already upon

The North American Life and Accident Insurance Company v. Burroughs.

that subject ; for I think it is straining the case to consider whether it was straining of the muscles or a direct injury ; whether death was caused by a blow or an accident is a matter of little consequence to the dead or the living."

4. The injury described in the proofs of loss is not an accidental injury, and, as such, was not covered by the policy, and their verdict must be for the defendants.

Answer : " I cannot so charge."

5. Sufficient proof of accidental injury, resulting in death, and that the death was caused solely by such accidental injury, was not furnished to the company.

Answer : " I decline so to charge you."

6. By the assured's change of occupation the policy became null and void.

Answer : " He did not change his occupation at all. There is no proof that he went into any other occupation. The only proof is, that he used to be a farmer, and, being on a visit, he turned to and assisted at hay-making ; what is submitted to you is the question — First, Whether the blow spoken of by Dr. Welling was actually suffered by the deceased ; Second, Whether that was the cause of his death. If you find both these things in favor of the plaintiff, then your verdict must be for the plaintiff, or ought to be. I will not say must be, for you are the judges of the facts and the credibility of the witnesses, and decide which you will credit, and reconcile any difference, and make up your own minds upon these two questions. If you find these two questions in favor of the plaintiff, the question then is simply resolved to the amount of the policy. There is no dispute about that. If you find for the defendants, of course there are no further instructions needed."

The court further charged : —

" This is an action by Mrs. Burroughs against this company to recover the amount of insurance upon her husband's life, to which she is entitled if death was caused by accident. I do not intend to trouble you with any of these objections which have been made by the defendants ; for I shall submit the question to you in a way which will prevent the necessity of troubling you with the same. I shall assume these points to be decided against the defendants, and that will reduce it very much to a question of fact for you ; because I think it is very clear that some of

these technical objections — perhaps all of them — have been waived by the defendants themselves. Our courts have decided that, where there is a difficulty about preliminary proofs, or where there is a difficulty about the conditions in a policy, that it is strictly within the power of the company to waive all the preliminary proofs, and where they do so waive, they cannot claim them afterwards before a jury. [I shall therefore rule, that the plaintiff, in regard to all these objections, is entirely clear, and has, notwithstanding these, a case before the jury.]

“ We have had a great deal of discussion about what the nature of this disease was. It was caused by some accident of some kind in a hay-field: some have called it by one name and some by another; but I suppose it would be expected to be the case under the circumstances. Which doctor is right, is a question; for, when experts are called to the stand, we find, in almost every case, you can arrange six on one side and six on the other. It is, after all, a simple question of fact. What are the facts? What was stated by Mrs. Burroughs as the cause of the accident is in evidence before you, and is not contradicted. [A party sustains an injury, and a physician is called in; the physician is enabled to describe the symptoms, and give such conversations as relate to the immediate matter as occurring between him and the patient;] otherwise, a doctor would be cut down to simple statement of what the disease was, as it appeared to him. Now in this case, outside of the question of peritonitis, the question, I think, for you to decide is, whether that alleged blow caused the death. If you believe there was such a blow, and that it caused such a swelling as described by Dr. Welling, when the other parties' physicians were not present; all they said is entirely speculative — entirely so; and when a physician swears to a distinct fact, and that distinct fact arises from a cause — a sufficient cause — satisfactory to him, given by the party himself, the question for you is, first, whether he was so injured, having received such a blow; whether it was equal to the kick of a horse, or a blow struck below the belt, — a practice not allowed by prize-fighters, — and it caused death; although death may not have occurred for several days. If you decide that the blow was inflicted, and that the blow was an accident, then there was sufficient cause to bring this lady within the provisions of that policy.”

The North American Life and Accident Insurance Company v. Burroughs.

The verdict was for the plaintiff for \$5,802.50.

The defendants had the record certified to the court in banc and assigned fourteen errors.

The 4th and 6th were to the parts of the charge in brackets.

The 7th. That the court left it to the jury to find that there was a blow from the handle of a pitchfork without competent evidence.

9-13. The answers to the defendant's 1st, 3d, 4th, 5th, and 6th points.

14. Not leaving to the jury to find whether there had been a change of occupation, and in ruling that there had been no such change.

S. Dickson, (with whom was *J. C. Bullitt*,) for plaintiffs in error.

J. H. Sloan, (with whom was *J. Goforth*,) for defendant in error.

The opinion of the court was delivered by

WILLIAMS, J. In this case the jury have found, on sufficient evidence, that while the insured was pitching hay, the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died; that the blow which he received from the fork-handle was an accident and the cause of his death. The case, therefore, comes directly within the terms of the policy declared on. But it is objected that the plaintiff was not entitled to recover, because no sufficient preliminary proof was furnished to the company that the death of the insured was caused solely by an accidental injury; that the injury described in the preliminary proofs of loss furnished by the plaintiff is not an accidental injury within the meaning of the policy, and is not covered by its provisions. The policy provides that no payment shall be due, and no claim be made under it, on account of the accidental loss of life of the assured, unless notice of the injury and of the death shall be given to the company within thirty days after the happening of either, and sufficient proof furnished said company of such injury, and that such death was caused solely by such accidental injury, and ensued within three months from the happening thereof. Substantially the same provision is also contained in the fourth condition of the policy: In case of injury producing death of the assured happening as aforesaid by

accident, within the meaning of this policy, the party for whose benefit the insurance is made shall within thirty days thereafter give notice of the same in writing, with sufficient proof of such injury and of death.

Notice was given to the company on the 12th of August, 1867, within the time limited by the policy, that the assured came to his death by accident on the 14th of July, by an injury received in the bowels, while working in a hay-field, producing peritoneal inflammation, which resulted fatally. And in proof thereof, the affidavits of the plaintiff and attending physician were subsequently furnished to the company. No objection was made to the affidavits on the ground that they were not furnished in time, and, under the evidence, no such objection could have been properly made. The only objection then and now made to the affidavits, is that they do not show that the assured "died as the result of any injury received by accident." But if the facts stated in the affidavits are true, why do they not make out a *prima facie* case of death resulting from an injury occasioned by accident? The plaintiff's affidavit expressly avers, "That her late husband died in consequence of an accident which happened on the 9th of July, 1867, on this wise: Said deceased, on the day aforesaid, was assisting in unloading hay in Hopewell township, New Jersey, at his grandfather's, where he had gone on a visit, when he accidentally strained himself. He immediately complained of severe pain, and a physician was summoned. All was done for his relief and recovery that could be, without success. He lingered till the fourteenth of said month, when he died, and the said accident was the direct cause of his death." And the attending physician, after stating in his affidavit that he personally knew the assured, says that he "knows that he was killed by accident on the 14th day of July last; and further, that the accident was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles, and produced peritoneal inflammation and all its concomitant symptoms, which resulted in his death on the 14th of July last." If the facts set forth in these affidavits be true, and they are perfectly consistent and reconcilable, do they not show with reasonable certainty that the death of the assured was caused by an accident? Taking both affidavits together they substantially allege that the assured, while assisting in hauling in and unloading hay, accidentally

The North American Life and Accident Insurance Company v. Burroughs.

strained himself, injuring his abdominal muscles and producing peritoneal inflammation, which resulted in his death ; and that the said accident was the direct cause of his death ; and if so, can there be any doubt as to the sufficiency of the preliminary proof ?

But it is said, that if the assured strained himself while unloading hay it was not an accident assured against within the meaning of the policy. Why not, if he *accidentally* strained himself, as is averred in the plaintiff's affidavit ? Why is not death resulting from an accidental strain as much within the meaning of the policy, as death produced by any other accidental cause ? If the injury be accidental, and the result of it death, what matters it whether the injury is caused by a strain or blow ? An accident is "an event that takes place without one's foresight or expectation ; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected ; chance, casualty, contingency." And accidental signifies, "Happening by chance or unexpectedly ; taking place not according to the usual course of things ; casual, fortuitous. We speak of a thing as accidental when it falls to us as by chance and not in the regular course of things ; as an accidental meeting, an accidental advantage," &c. Webster's Dictionary *ad verba*. If then these words, as used in the policy, are to be understood in their plain and ordinary meaning as thus defined, they include death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things. And there is no more reason for regarding an injury of the abdominal muscles, caused by an unexpected blow, an accident, than an injury caused by a casual and unlooked for strain. If the death of the assured resulted from an accidental strain, then it was not "caused by natural disease." And if it resulted from any accidental strain, it does not follow that it was caused by "unreasonable imprudence," or "the doing of an unlawful act," and there is nothing in the affidavits from which such an inference can be fairly drawn. Taking the facts to be as stated in the affidavits they undoubtedly make out a *prima facie* case of death resulting from an injury accidentally received ; and if so, the preliminary proof furnished by the plaintiff must be regarded as sufficient, and there was no error in refusing the defendant's fourth and fifth points.

Whether the plaintiff was entitled to recover on showing that

the death of the assured resulted from an injury of the abdominal muscles, caused by a blow, and not by an accidental strain, is another question raised by the defendant's third point, which we shall now proceed to consider. No objection was made to the admission of the evidence on the ground of variance, and the only question is whether the plaintiff under the preliminary proof was entitled to recover for death resulting from an accidental injury, shown to have been caused by a blow instead of a strain. The policy does not expressly require that preliminary proof shall be furnished of the mode and manner in which "the injury producing death" was inflicted; but only that "sufficient proof be furnished of *the injury*, and that such death was caused solely by such accidental injury." The affidavit of the attending physician describes *the injury* which the assured received, and in consequence of which he died, precisely as it was proved by his testimony on the trial. The only difference between them is that in the former the cause of the injury is not stated otherwise than by terming it "an accident," and in the latter it is shown to have been caused by an accidental blow from the handle of a pitchfork. But the injury, as described in both, is in all respects the same and its results are the same. If then "the injury producing death" is correctly described in the preliminary proof, why shall not the plaintiff be allowed to recover though she may have imputed it to a wrong cause, — to a strain instead of a blow? It seems to us that under the terms of the policy the plaintiff is entitled to recover if she has given sufficient preliminary proof of the injury, though she may have unwittingly ascribed it to a wrong cause. It is not such a variance as should be regarded as fatal. Undoubtedly there must be sufficient preliminary proof of the injury, that it was accidental, and the cause of the death of the assured. These requisites are all found in the preliminary proof furnished by the plaintiff in this case; and they are all that the policy requires. If the injury, as ascribed in the affidavit of the attending physician, was the cause of the death of the assured, it is a matter of no consequence, so far as respects the liability of the company, whether it was produced by an accidental strain or by an unexpected blow from the handle of a pitchfork.

But it is further objected to the plaintiff's right of recovery that the assured did not give notice of the change of his occupation, nor pay the difference of premium for the extra hazard, as

Cunningham v. Smith's Administratrix.

required by the second and third conditions of the policy, and therefore the contract became null and void. But there was no evidence that the assured had changed his occupation or business, and the learned judge before whom the case was tried rightly refused to submit the question to the jury. The assured, as was shown, while on a visit to his grandfather, had assisted in hauling in and unloading hay. But this was not a change of his occupation or business within the meaning of the policy. To give to the word such a construction would prevent the assured from performing any act or service outside of his usual avocation or business without rendering the policy null and void. Such a construction would be unreasonable and absurd, and the defendant's 1st and 5th points were properly refused.

The 1st, 2d, 3d, 5th, and 8th assignments are not in accordance with the rules and must be disregarded; but if properly made there is nothing in them which would avail the plaintiff in error. The 6th and 7th assignments are not sustained, and there is nothing in them that calls for special notice. The question presented by the remaining assignments (the 9th, 10th, 11th, 12th, 13th, and 14th) have been already considered, and as we discover no material error in the record the judgment is affirmed.

Judgment affirmed.

CUNNINGHAM *et al.* vs. SMITH'S administratrix.

(70 Penn. St. 450. Supreme Court, 1872.)

Letters of administration are *prima facie* evidence of the death of the person on whose estate they are granted, and where there is no issue made upon them, are conclusive evidence of the fact of death.

Assignment. — One has a right to have his life insured with the money of another and then to assign the policy to him absolutely.

A policy of insurance was issued to S. on his life, the premiums being paid by C., to whom S. immediately made an absolute assignment of the policy. The evidence in the case insufficient to submit to the jury that the assignment was as collateral.

THIS was an action of assumpsit brought March 31st, 1869, by Anne Smith, administratrix, &c., of Jerome Smith, deceased, against Winthrop Cunningham, William T. Cunningham, and Graham P. Cunningham, trading as W. Cunningham & Sons.

Jerome Smith having been in his lifetime connected in business with the defendants, effected an insurance on his life with the

Connecticut Life Insurance Company for \$5,000, and assigned the policy No. 88,435 to the defendants; after his death they collected the amount of the insurance. The suit was brought by the plaintiff to recover what had been received by the defendants on the policy.

The question was whether the assignment of the policy to the defendants was absolute or as collateral security.

The case was tried before Thayer, J., October 31st, 1870.

The plaintiff gave in evidence her letters of administration on the estate of Jerome Smith, deceased, granted March 15th, 1869, also articles of agreement dated September 1st, 1868, between the plaintiff of the first part, and W. A. McCann and Jerome Smith, trading as W. A. McCann & Co., of the second part, reciting that the parties of the second part were about to establish themselves in business in Vera Cruz, &c., and agreeing that the two parties should purchase and consign goods to each other from the United States, and Mexico, and Central America respectively, and divide the profits; the party of the first part to furnish the other party with cash and letters of credit, &c. Also policy of insurance No. 88,435, dated September 19th, 1868, issued by the Connecticut Life Insurance Company to Jerome Smith for insurance on his life for \$5,000, indorsed thereon, assignment by Jerome Smith as follows:—

“PHILADELPHIA, *September 19th, 1868.*

“For value received, the receipt of which is acknowledged, I hereby assign, transfer, and set over absolutely unto W. Cunningham & Sons and assigns policy No. 88,435, to which this is annexed, issued on my life by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and any money which may at any time hereafter come to be payable by reason thereof, and all and singular the remedies in law, equity, or otherwise for the recovery thereof.”

Also indorsed, receipt March 13th, 1869, by defendants for \$5,000, less \$1.42 premium.

Also policy of insurance from same company, dated September 12th, 1868, countersigned by W. H. Tilden, agent, September 19th 1868, on life of Jerome Smith, for \$5,000, payable to Mrs. Annie Smith, with receipt, Annie W. Smith, dated March 13th, 1869, indorsed thereon for \$5,000, less \$1.50 premium due.

Cunningham v. Smith's Administratrix.

Also receipt of J. B. Gest, defendant's attorney, viz. : —

“Received March 5th, 1869, of Mrs. Jerome Smith, her draft upon the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, per Walter H. Tilden, Esq., its agent in Philadelphia, of this date, to our order for \$523.75, payable upon settlement of the policy of insurance on the life of her late husband, standing in her name, such amount when paid to be in full receipt and acquittance of premium paid by us September 17th, 1868, on said policy, viz., \$113.75, and also \$410 advanced by us to her, as follows,” &c. (stating specific payments.)

Mrs. Smith, the plaintiff, who was the widow of the decedent, testified that her husband sailed from Philadelphia for Havana, September 17th, 1868; on the 10th of October, W. T. Cunningham called on her, and asked her for the policy which the decedent had taken out; he said he had received a letter from Gonzales Poey at Havana, informing him of the decedent's death, on the 2d, of yellow fever; she said that at an interview shortly afterwards “he told me that the policy they had taken out to secure them against losses was lost, but that mine were all right. . . . He said they had lost their policy, and they did not know what they could do. They had failed, he said, to pay the premium when they were called upon, or something to that effect. He said he intended to publish the company in every State in the Union, because they had failed to pay the money.”

H. W. Smith, a son of the plaintiff and stepson of decedent, testified as to his mother's first interview with Cunningham substantially as she did; he also testified: . . . “She wanted to go on; he told her she could not go; that she had plenty of money to live on, and they would not see her want for anything; he left some money for mother at that time; he laid it on the table; I don't know how much; on the following Sunday I saw him there again; he then told mother that the policy they had taken out was lost on account of non-payment of the premium, but that mother's policies were all right; they had neglected to send the check for the premium around; he said that they had lost the policy that they expected would cover all the expenses, because they had neglected to send a check to Mr. Tilden; mother said she would have the body brought on at any expense; I went into the employ of the defendants November 9th. While in their employ I asked several times for the policies, at my

mother's instance; I never got them, and they always gave excuses: said that Mr. Gest had them, and they forgot to get them; Cunningham said mother's policies were all right, but the one taken out to secure them was lost."

The plaintiff offered in evidence the deposition of Gonzales Poey, also a letter from witness to defendants, dated October 2d, and a letter from defendants to witness dated October 5th, 1868, both referred to in deposition.

The defendants objected to the offers; they were admitted, and several bills of exception sealed.

The witness Poey proved the death of Smith at Havana, of yellow fever, on the 2d of October, and that he telegraphed to the defendants on the 3d of October, in the morning; he wrote to defendants by steamer on the 3d. He also informed Mr. Neilson, of Havana, of Smith's death, and saw his effects sealed up by the American consul at Havana; the body was embalmed by the consul and witness, under directions, by telegraph, from the defendants.

The letter from witness to defendants informed them of Smith's death; that his effects were in the hands of the American consul; that he had \$760.55 in money; that the consul would pay all expenses, &c. The letter from defendants to witness acknowledged the receipt of the telegram from witness, stating it was paid; saying they had sent a telegram directing the embalming of the body; that the money was defendants'; directed witness to save expenses. In the letter the defendants said they could not get permission from the health officer to land the body, and had ordered Mr. Neilson to bury the body without embalming; that in consequence of the destitute condition of the family of the deceased, they were anxious to cover all possible expenses, "and thereby assist them if we can; we want all expenses saved that can be on account of the wife and family."

The plaintiff gave in evidence an account presented by the defendants to her for advances to the decedent, premium on life policy, postage, half expenses of returning of body, &c., amounting in all to \$1,431.39.

Winthrop R. Cunningham testified that he was present at several interviews between Smith and the defendants at their office, shortly before Smith started for Vera Cruz. "William T. Cunningham suggested to him, and to the firm, that his life

Cunningham v. Smith's Administratrix.

should be insured. This was agreed upon, and Smith expressed himself willing it should be done to any amount for the benefit of W. Cunningham & Sons. I am now speaking of several conversations. I do know that in the course of one conversation W. T. Cunningham said distinctly to Jerome Smith that he wanted it clearly understood that on any insurance that he effected for the firm, that if he died, we made the insurance; if he didn't, we lost the premium. I remember those words; Jerome Smith fully assented to this. And William T. Cunningham further suggested that he should insure his life for the benefit of his wife and family; Jerome Smith replied that he had no money. William T. Cunningham (that is the firm) offered to furnish the money, and did so. Jerome Smith left to go to the office of Walter H. Tilden, the agent of the Connecticut Mutual Life Insurance Company, to make application and be examined. I know the policies were issued, and I saw the assignment. I saw the policies and both the assignments — one was to W. Cunningham & Sons, and the other assignment was to Mrs. Annie Smith, wife of Jerome Smith. I know that W. Cunningham & Sons paid the premiums on both policies. When the subject of insurance was introduced, Jerome Smith mentioned the Continental Insurance Company; but that company was strange to W. Cunningham & Sons, who had their insurance largely in the Connecticut Mutual, and they recommended that company. The firm agreed to place \$5,000 on his life for the benefit of his wife. The amount of W. Cunningham & Sons' policy was left entirely to them, Jerome Smith signing the assignment to them in blank as to the amount of the policy; they were to decide as to the amount at their convenience; the question was whether it was to be five, or ten, or fifteen thousand dollars. . . . It was intended to guard against any possible loss in case of his death, although it was clearly looked upon and intended as an investment. . . .

“It was clearly understood and agreed upon between Mr. Smith and W. Cunningham & Sons that it was to be solely for the benefit of W. Cunningham & Sons, free from any claim of any kind. Mr. Smith was asked if he was willing that his life should be so insured, and he expressed himself as being perfectly willing, without reserve. I know from what I heard, that irrespective of this policy Mr. Smith was to refund to W. Cunningham & Sons any private advances, and the money furnished

him was to be invested in merchandise for benefit of McCann & Smith and W. Cunningham & Sons."

G. P. Morgan, a book-keeper of defendants', testified "that a few days before Smith sailed, Smith, in answer to the inquiry by W. Cunningham, whether he had made provision for his family, said he had, in the Continental Insurance Company; William Cunningham asked him if that was all he would like to have; he said he would like to have more, but couldn't afford it; William Cunningham said if he wanted more the firm would advance money to pay the premium; he seemed thankful; an application was made to the Connecticut Company and a policy was taken out for his wife; there was then a further conversation about a policy to be taken out for the benefit of the firm, and as to whether there would be any difficulty in their taking out a policy which would secure them the amount of it in case of his death, whether they had any interest or not; Mr. Smith said they could take out a policy for whatever amount they liked, if they would pay the premium; he then went to the Connecticut Mutual Insurance Company's office and signed an application in blank, and also an assignment; he told me he had done so; Mr. W. Cunningham said it was understood that they were to recover the money whether Smith was indebted to them or not, that it was an investment on their part; . . . it was understood that this policy had nothing to do with their advances to Mr. Smith, or to the business in Mexico; I heard Mr. Cunningham say this to Mr. Smith. The policy had nothing to do with the advances to Jerome Smith, or the risks of the business in Mexico; it was, as I said, an investment on Mr. Smith's life; there was no business risk spoken of; it was outside of all these matters; these checks were filled up by me, and were given for premiums on the two policies in the Connecticut Mutual."

Walter H. Tilden testified: "As agent for the Connecticut Mutual Life Insurance Company, I issued these policies. . . . I witnessed the assignment of this policy to defendants. Jerome Smith said it was to be an absolute and unconditional assignment, and it was so drawn by me; it was not recorded; the assignment specifies no amount. The policy was made out on its date, September 19th, 1868. Our policies are not valid until countersigned by me as the local agent. I countersign them when delivered. These policies were countersigned the same day. The last policy

was received about a week afterwards. They were dated even, so as to secure the assignment. The assignment was in blank, only to be issued in case the policy was issued. It was signed September 15th, 1868, at the time he made the application."

There was some contrariety of evidence whether the premiums had been paid by defendants to the insurance company before or after the death of Smith.

The plaintiff's 5th point which was affirmed was : —

"If the jury find from the evidence that the policy in question was assigned to defendants to secure them from loss for moneys by them advanced or to be advanced to Jerome Smith or McCann & Co., or from loss on business done with said firm, then the plaintiff is entitled to recover from defendants the amount received from the insurance company less such moneys so advanced and such losses ; and that the defendants must show the amounts of such advances or losses."

The defendants submitted these points : —

1. The assignment of the policy by Jerome Smith in his lifetime to the defendants vested in the defendants a right to the money to be paid at his death by reason of the policy, and the verdict should be for the defendants.

2. If the jury believe from the evidence that the assignment of the policy of insurance by Jerome Smith to the defendants was not made in fraud of creditors, the verdict should be for the defendants.

3. If the jury believe from the evidence that the defendants with their own moneys paid the premium for the policy, then they are entitled to the benefit for the same, and the verdict should be for the defendants.

6. A mere voluntary assignment by a party, of a policy of insurance on his own life, is good against his executors or administrators ; and if the jury find from the evidence that Jerome Smith did assign the policy in question, the verdict must be for the defendants.

9. Whether the payment of the premium by defendants to the insurance company was after or before the death of Jerome Smith is not material, except as between the company and the defendants ; and if the company, notwithstanding, paid the amount insured to the defendants, the fact, if it be so, that the premium was not previously paid, cannot enure to the benefit of the plaintiff.

10. On all the evidence in the case, the verdict of the jury should be for the defendants.

In answer to the points the court said:—

“As to the 9th point, I decline to say that it is a totally immaterial circumstance in the consideration of the case, though it does not appear to me to be very material, but I leave it with all the facts to you. I will say, however, that in point of law it is not material whether the premium was paid before or after the death.

“The other points of the defendants I decline to instruct you as requested.”

The court also charged:—

“If the jury should find that the assignment of September 19th, 1868, although on its face an absolute assignment, was in truth and in fact, and by the agreement and understanding of the parties intended to be only an assignment intended to secure the defendants their advance and expenses, or to secure other claims which they might have against William A. McCann & Co.; in other words, that they were only to acquire a limited interest in the policy instead of the absolute ownership, then the defendants, out of the amount which they collected from the company on the policy, can retain only such sum as represents, and is equal to their advances or expenses, or other just claims against William A. McCann & Co., and the remainder belongs to the plaintiff, and she is entitled to a verdict for it. And if the jury take this view of the evidence, then they have to allow the defendants only such advances, expenses, or other just claims as they have proved. If the jury take that view, you will allow the defendants what would represent their advances and just claims against McCann & Co., up to the time of Jerome Smith's death, and no longer.”

The verdict was for the plaintiff for \$3,700.

The defendants took a writ of error.

They assigned for error:—

1, 2, 3. The admission of plaintiff's offers of evidence which was objected to.

4. Affirming plaintiff's 5th point.

5-9. Refusing to affirm the defendants' 1st, 2d, 3d, 6th, and 10th points.

10. The answer to defendants' 9th point.

11. The portion of the charge above quoted.

J. B. Gest & G. W. Thorn, for plaintiff in error.

G. Junkin, for defendant in error.

The opinion of the court was delivered, February 8th, 1872, by SHARSWOOD, J. We are of opinion that the evidence offered by the plaintiff below and received by the court under exceptions by the defendants, which forms the subject of the first three specifications of error, was irrelevant and inadmissible. More than that, it was calculated to distract and divert the attention of the jury from the only true point in the issue, which was, whether the assignment of the policy on the life of Jerome Smith by the Connecticut Mutual Life Insurance Company, No. 88,435, to the defendants was absolute or as collateral security for advances by the defendants. That this was the true and only question which arose upon the evidence is abundantly clear, and indeed is not disputed. The only ground upon which it has been attempted to sustain the admission of the evidence is, that it proved the fact of the death of the insured. It is said that this fact was essential to the plaintiff's recovery, and that although it was an admitted fact, the plaintiff was not bound to accept the admission, but could insist on proving it, and if the evidence of it gave her any collateral advantage with the jury she was entitled to the benefit of it. This may be true in general, but it is not true when the fact in question is conclusively admitted by the pleading, as was the case here. The action was by the plaintiff as the administratrix of Jerome Smith. There was no plea in abatement denying the death of Jerome Smith, and setting up the consequent invalidity of the letters of administration. The letters are not only in all cases *prima facie* evidence of the death of the person on whose estate they are granted, but when there is no plea to them, and consequently no issue made upon the grant, they are conclusive evidence of the fact of death. 1 Greenl. on Ev. § 550; *Newman v. Jenkins*, 10 Pick. 515; *McKimm v. Riddle*, 2 Dall. 100; *Axers v. Musselman*, 2 P. A. Browne, 115.

The next six specifications of error, which are to the answers of the court below to the points of the plaintiff and defendants, may all be resolved into one question, — Whether there was any sufficient evidence to submit to the jury upon which they could find that the assignment of the policy No. 88,435 was as a collateral security for present or future indebtedness by the assignor

to the assignees. The defendants may have had such an interest in the life insured under the contract of September 1st, 1868, as would have entitled them to insure his life in their own names. That, however, might have been a question. But Jerome Smith's interest in his own life was unquestionable, and if he was willing to insure himself with their money and then assign the policy to them, there is no principle of law which can prevent such a transaction. Indeed this is not controverted. Now, not only was the assignment in question on the face of it simple and absolute, but it was specially expressed so to be under the hand and seal of Jerome Smith himself: "I hereby assign, transfer, and set over absolutely," is its language. Mr. Tilden, the agent of the insurance company, by whom the assignment was drawn and witnessed, testified, "Jerome Smith said it was to be an absolute and unconditional assignment." Two other witnesses testify to other declarations by him of the same import, at or about the same time. Mr. Morgan said: "There was then a further conversation about a policy to be taken out for the benefit of the firm, and as to whether there would be any difficulty in their taking out a policy which would secure them the amount of it in case of his death, whether they had any interest or not. Mr. Smith said they could take out a policy for whatever amount they liked if they would pay the premium." And again: "It was understood that this policy had nothing to do with their advances to Mr. Smith or to the business in Mexico. I heard Mr. Cunningham say this to Mr. Smith." Winthrop R. Cunningham in his deposition said: "W. T. Cunningham said distinctly to Jerome Smith that he wanted it clearly understood that in any insurance that he effected for the firm, that if he died, we made the insurance; if he didn't, we lost the premium. I remember these words; Jerome Smith fully assented to this." And again: "It was clearly understood and agreed upon between Mr. Smith and W. Cunningham & Sons that it was to be solely for the benefit of W. Cunningham & Sons, free from any claim of any kind." The testimony of these witnesses was in support of what appeared on the face of the writing. On the other hand, what is set up to impeach the writing thus sustained? First, the testimony of the plaintiff to a declaration by one of the defendants after the death of Smith that they had taken out the policy to secure them against losses; and, second, the testimony of Henry K. Smith, a

Cunningham v. Smith's Administratrix.

son of the plaintiff, that he had overheard the same conversation, and that Mr. Cunningham said "that they had lost the policy that they expected would cover all the expenses;" and again, "that the one taken out to secure them was lost." It may be that there was a time when this would have been considered a *scintilla* of evidence, sufficient to justify the submission of the case to the jury, but that doctrine is now exploded. *Howard Express Company v. Wile*, 14 P. F. Smith, 201. It was evidently insufficient to authorize the jury to draw the inference that the assignment was other than absolute, and the question ought not therefore to have been submitted to them. It was a mere loose declaration, in the course of a casual conversation, unaccompanied with any admission of liability, at a time when the declarant supposed that the policy had been lost for want of the payment of the premium in proper time. It could not fairly be intended to mean, that the insurance was designed to secure the defendants for advances; but simply to secure them against losses and expenses generally in that business in which they had engaged with Jerome Smith, and on account of which they had insured or wished to insure his life. Under such a contract as they had made with Mr. Smith, they might well look forward to the contingency of losses and expenses other than those which would result from the failure of Smith to refund advances made to him. They contemplated consignments of merchandise to him for sale in Mexico or to the firm of McCann & Co., of which he was a member; and such consignments, instead of resulting in profits, might end in losses and expenses which the defendants would have to bear. Upon this, which is the most reasonable interpretation of the language, there was nothing to contradict the absolute character of the assignment.

As to the 10th assignment, the learned judge was certainly right that in point of law it was not material whether the premium on the policy was paid before or after the death of the insured. If so, it was an error to submit the question to the jury.

It is unnecessary to consider the 11th assignment. No doubt, upon the basis that the policy was assigned to the defendants as a mere collateral security for advances made to or debts owing by Jerome Smith, or the firm of which he was a member, the answer of the learned judge was entirely correct.

Judgment reversed, and *venire facias de novo* awarded.

VERMONT.

PATCH *vs.* THE PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(44 Vt. 481. Supreme Court, 1872.)

Marginal clause. — An entry upon the margin of a policy issued as a "paid up policy," in exchange for an endowment policy, upon which two annual premiums had been paid, partly by two notes, as follows: "This policy is conditional on the interest on the two notes given in part payment for two premiums paid on No. 10,603 being paid in advance;" held to be a part of the policy, the same as though inserted in the body of the instrument.

Premium notes. — The notes provided that the interest thereon should be paid in advance, and it was held that the effect of the marginal clause was to make the policy conditional upon the payment of the interest annually in advance; that the terms of the condition were not complied with by payment of the interest in advance the first year only.

The interest upon the notes became practically a premium upon the policy, payable annually in advance, and on failure to pay the same, the company ceased to be liable, and the policy was forfeited.

ASSUMPSIT to recover a sum specified in an insurance policy. The case was tried upon the following agreed statement of facts: On the 21st day of February, 1865, the defendants, on the application of Charles W. Ripley, then the husband of Lucy B. Patch, who is now the wife of said John Patch, and one of the plaintiffs in this suit, assured the life of said Charles W., and executed and delivered to him an endowment policy of insurance for \$5,000, payable to the said Lucy B. when the said Charles W. should attain the age of forty years, (he then being of the age of twenty-four years,) or at the date of the death of said Charles W., should he decease prior to attaining that age, upon the condition, among others, that he pay the defendants the annual premium of \$279 on or before the 21st day of February, in each and every year thereafter, during the continuance of said policy. Said policy is hereunto annexed and made part of this case, and marked "A." Said Charles W. paid two annual premiums on said policy, one at the date thereof, and one in one year thereafter. Said annual premiums were paid partly in cash, and partly by two notes, which are hereunto annexed and marked "B" and "C" respectively, and made part of the case. Said notes were executed and delivered to the defendants on the days when they respectively bear date, by said Charles W. On the 30th day of March, 1867,

said Charles W. surrendered said policy to the defendants, who executed and delivered to him another policy of insurance, called a "paid up policy," No. 19,543, in lieu of and in payment of said first named policy, for the sum of \$625, which last named policy is hereunto annexed and made part of this case, and marked "D." It is agreed that if the written memoranda on the margin of said policy "D" are in law a part of the policy, the papers marked "B" and "C" are the notes referred to therein, and it is agreed that said memoranda were upon said policy when it was executed and delivered. Prior to the surrender of said policy "A," the interest on said notes had been paid up to the 21st day of February, 1867, and at the time of its surrender, and previous to the execution and delivery of said policy "D," the interest on said notes was paid one year in advance and up to the 21st day of February, 1868. Just before the said 21st day of February, 1868, the date when the next annual instalment of interest became due on said notes, the defendants sent a notice by mail to the said Charles W., directed to Wilmington, Vermont, it being his last place of residence known to the defendants, informing him when said instalment of interest would become due, which notice was returned to the defendants, it not having been called for by said Charles W. at the post-office in said Wilmington. The said Charles W., at the time said policy "A" was surrendered, and for some time prior thereto, resided at said Wilmington, but when said notice reached there, as aforesaid, he had changed his residence to Hartford, Connecticut, where he was then residing; but this change of residence was not known to the defendants, they having received no notice thereof. The defendants never gave the said Lucy B. notice that any interest was due on said notes, or demanded payment thereof of her, nor did she have any knowledge or notice that any further payment was required on said policy "D," unless such notice is to be implied from the terms of said policy, neither did she or the said Charles W. ever pay, or offer to pay, any interest thereon except as aforesaid.

Said Charles W. died on the 25th day of October, 1870, at Montague City, Mass., and proper proofs of his death were made and forwarded to the defendants, whereupon the defendants notified the said Lucy B. that said policy "D" had lapsed and was no longer in force, by reason of the non-payment of the interest on said notes, as required by the terms and conditions thereof,

Patch v. The Phoenix Mutual Life Insurance Company.

and refused to pay the same. The rights of the parties upon the foregoing statement of facts and papers annexed are submitted for the judgment of the court. Immediately upon the delivery of policy "D" it was passed into the hands of the said Lucy B., by her husband, he saying to her, "There is a paid up policy for you. You'll have so much if I am taken away." And said policy remained in her keeping until the death of her husband as aforesaid.

The court, Ross, J., presiding, in this case having, *pro forma*, rendered judgment on the above agreed statement of facts, for the plaintiff to recover \$625 damages, the defendant excepted.

The following are the papers above referred to:—

"B."

\$139.53.

HARTFORD, February 21st, 1865.

Twelve months after date, for value received, I promise to pay the Phoenix Mutual Life Insurance Company, or order, one hundred thirty-nine 53-100 dollars, with interest payable annually, in advance, at 6 per cent., it being for part premium due and payable on policy No. 10,603 of said company, on the life of Charles W. Ripley, dated February 21st, 1865, which policy and all payments or profits which may become due thereon, are hereby pledged and hypothecated to said company for the payment of this note.

No. 10,603. Interest, \$8.40.

CHARLES W. RIPLEY.

The other note, called paper "C" in the agreed statement, was for \$140⁰⁰/₁₀₀, and was in same terms as paper "B."

POLICY "D."

PHOENIX MUTUAL LIFE INSURANCE COMPANY, HARTFORD, CONN.

No. 19,543.

\$625.00.

Paid up Policy, in lieu of 10,603 of Feb'y 21, 1865.

2-16 *paid.*

This policy of assurance witnesseth, that the Phoenix Mutual Life Insurance Company, in consideration of the representations made to them in the application for this policy, and of the sum of five hundred and fifty-eight dollars and ten cents, to them in hand paid by Lucy B. Ripley, do assure the life of Charles W. Ripley, of Wilmington, in the county of Windham, State of Vermont, for the sole and separate use and benefit of the said Lucy B. Ripley, in the amount of six hundred and twenty-five dollars, payable to the said Lucy B. Ripley, or her executors, administrators, or assigns, on the 21st day of February, 1881, when the said C. W. Ripley shall have attained the age of forty years, or to her executors, administrators, or assigns, should Charles W. Ripley die previous to attaining that age.

Interest,
\$16.80.

Annual
Premium,
\$558.10.

amount of

Sum in-
sured,
\$625.00.

Age 24.

Patch v. The Phoenix Mutual Life Insurance Company.

And the said company do hereby promise and agree to and with the said assured, well and truly to pay, or cause to be paid, the sum assured, as aforesaid, within ninety days after notice and proof of interest, (if assigned or held as security,) and of the death of Charles W. Ripley. Term.
Pay at 40.

This policy "D" contained the ordinary provisions found in policies, among which was the following:—

"And it is also understood and agreed, to be the true intent and meaning hereof, that in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine.

"And it is further agreed, that in every case where this policy shall cease, or be or become null or void, all payments made thereon and all dividend credits accruing therefrom, shall be forfeited to the said company."

This policy was duly signed, and dated March 30, 1865.

The marginal clause referred to above is as follows:—

"This policy is conditional on the interest on two notes given in part payment for the premiums paid on No. 10,603 being paid in advance."

On the back of the said policy was the following inscription:—

"PURCHASE OF POLICIES.

"The company will purchase any of its policies, while in force, on which two annual premiums have been paid, and give for them their equitable value; or, if the party prefers, will issue a new paid up policy, for the amount of insurance that the equitable value of the policy surrendered will purchase, thus making all policies non-forfeitable."

Dunton & Veazey & J. M. Tyler, for the defendants.

Charles N. & G. W. Davenport, for the plaintiff.

The opinion of the court was delivered by

PIERPOINT, Ch. J. The first question that naturally arises upon the case, as made up and agreed upon by the parties, is whether or not the memorandum entered upon the policy of insurance prior to its execution and delivery is to be treated as a part of the policy, to be considered and taken into account in determining the true meaning and effect of the instrument itself.

We think the entry upon the margin of this policy of the words, "This policy is conditional on the interest on the two notes given in part payment for two premiums paid on No. 10,603 being paid in advance," must be treated as a part of the policy, and the same effect given to them in determining the character and conditions of the policy, as would be given to them, if they had been inserted in the body of the instrument. The rule that entries so made upon the margin of an instrument are to be regarded as a part of it, has long been settled in this State, and elsewhere, and is not now seriously controverted in the case. *Graham v. Stevens*, 34 Vt. 166 ; 57 Maine, 170.

Regarding this memorandum as a part of the contract of insurance, what then is the true legal effect and scope of the whole instrument? It appears from the agreed statement of facts, that on the 21st day of February, 1865, Charles W. Ripley, then the husband of Lucy B. Patch, the female plaintiff in this case, procured of the defendants what is called an endowment policy of insurance for \$5,000, payable to the said Lucy B. when the said Charles W. should attain the age of 40 years, (he then being 24 years of age,) or at the death of the said Charles W., should he decease prior to attaining that age, upon the condition that he pay the defendants the annual premium of \$279, on or before the 21st day of February, in each and every year, during the continuance of said policy. On this policy the said Charles W. paid two annual premiums, partly in money and partly by two notes, which two notes are the same that are referred to in the memorandum on the policy now under consideration.

On the 30th day of March, 1867, the said Charles W. and the defendants entered into an arrangement by which the aforesaid endowment policy was surrendered, and the present policy, which is called a "paid up policy," issued in lieu thereof. The consideration of this last policy was the premium which had been paid upon the first; and as such premium was in part paid by the two notes referred to, the defendants sought to make this policy conditional upon the payment of the interest annually, and in advance, upon these two notes. This object we think was fully accomplished by the memorandum upon the margin.

But it is said that as the memorandum only refers to the payment of the interest in advance, and does not say annually, the terms of the condition were complied with when the interest was

Patch v. The Phoenix Mutual Life Insurance Company.

paid in advance for the first year. This we think is quite too narrow a construction. The interest upon the notes, by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction would be a manifest violation of the meaning and intent of the parties to this contract. The defendants having taken the notes in the place of the money, it could not reasonably be expected that the defendants would do less than to secure the payment of the interest thereon, by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it was included in the body of the instrument, the interest upon the notes becomes practically a premium upon the policy, payable annually in advance; and on failure to pay the same, the company ceases to be liable and the policy is forfeited.

As in this case such interest or premium was not paid according to the terms of the policy, the plaintiffs cannot recover thereon. *Baker v. Insurance Co.* 43 N. Y. 283;¹ *Pitt v. Insurance Co.* 100 Mass. 500.²

Judgment reversed, and case remanded.

¹ *Ante*, vol. 2, p. 125.

² *Ante*, vol. 1, p. 284.

CALIFORNIA.

MARGARET SCOLES vs. THE UNIVERSAL LIFE INSURANCE COMPANY.¹

(42 Cal. 523. Supreme Court, 1872.)

"Local disease." — A tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitute a local disease, as matter of law, within the meaning of the word "local," when used by a life insurance company to an applicant for insurance, by asking him if he has a local disease.

Usual medical attendant. — The question, who was the usual medical attendant upon an applicant for life insurance is a question of fact for the jury, in an action on a life insurance policy.

APPEAL from the district court of the Twelfth Judicial District, city and county of San Francisco.

This was an action to recover five thousand dollars, insurance upon the life of Paul Scoles, the plaintiff's deceased husband. It was tried before a jury, and resulted in a verdict and judgment for plaintiff, as prayed by her. A motion for a new trial having been denied, defendant appealed from the judgment and order.

In its answer, the defendant, after setting out the statements furnished by Paul Scoles at the time of his application, alleged that they were false and untrue, for the reason that he was at that time "in bad and feeble health, and suffering from consumption and dysentery, and an abscess and tubercles upon the right lung, and from tubercles upon the brain; his health was thereby greatly impaired," and that the statements as to the age of his parents and relatives, at the time of their death, were false and untrue.

The instructions asked by the plaintiff, and given to the jury, were as follows: —

"A. Who was the usual medical attendant of the party applying for insurance is a question of fact for the jury to decide.

"B. The examination of the party, whose life is insured, by the examining physician of the company, and his favorable report

¹ This case was received too late to be put in its proper place.

as to the then physical condition and health of Paul Scoles, are circumstances entitled to the serious consideration of the jury, but are not conclusive or binding on the defendant.

“C. If the insurers defend on the ground that the insured misrepresented the fact in respect to his having had severe illness, local injury, or personal injuries, and was not in good health at the time of effecting the insurance, the burden of proof is on them.

“D. In cases where the testimony upon any particular issue leaves it doubtful whether the affirmative of that issue is sustained, it is a safe and proper course for the jury to find against the party who has the burden of proof upon that issue.

“E. The party upon whom is cast the affirmative of an issue must make out the existence of the issuable fact by preponderating evidence.”

The instructions asked by defendant, and refused, were as follows:—

“O. If you shall find, from the evidence, that Paul Scoles represented to the defendant that he had had no local diseases or serious illness of any kind, you are instructed that such representation was a warranty to the defendant of that fact; and if you shall further find that such representation was false in fact, you are instructed that there was such a misrepresentation as to avoid the policy sued upon, and that the plaintiff is not entitled to recover.

“P. You are also instructed, that in case you shall find, from the evidence, that Dr. Verhave had not been called upon by Paul Scoles to attend him in his professional capacity, for two years prior to August 5th, 1867, and that Dr. Holbrook had, during the year prior to that date, been consulted professionally by him, and had prescribed remedies for him, and that within said period of two years Paul Scoles had been sick, and had not called upon Dr. Verhave to attend him, then Dr. Verhave was not his usual medical attendant.

“Q. If you shall find from the evidence, that Paul Scoles represented to the defendant that he had never had any ‘local disease’ of any kind, and shall find that the contract of insurance introduced in evidence was entered into by the defendant upon the faith that such representation was true, and shall also find that Paul Scoles had, within a year prior to the time of

making such representation, had a local disease, you are instructed that the contract of insurance sued upon never took effect, and that the policy of insurance offered in evidence never had any existence as a contract, and that the plaintiff is not entitled to recover thereon.

“R. You are also instructed that whether Paul Scoles knew that he had had such local disease is immaterial, in arriving at your determination in this matter.

“S. You are also instructed that a tubercular affection of the lungs, or tubercles upon the lungs, or tubercles upon the brain, or consumption, would either of them constitute a ‘local disease,’ within the meaning of that term, as used in the application of Paul Scoles.”

The court below, in its charge, instructed the jury, among other things, as follows:—

“If you find that prior to making the application for the policy sued on, Paul Scoles had had any serious illness, serious local disease, or serious personal injury, the plaintiff cannot recover, whether Paul Scoles knew or remembered that he had had such illness, local disease, or personal injury, or not.

“On behalf of the defendant I give you this instruction: You are instructed that the plaintiff in this action is bound by all the statements and representations made to the defendant by Paul Scoles, and that any misrepresentation on his part is available to the defendant in this action, as much as if the misrepresentation had been made by the plaintiff.”

Jarboe, Harrison & Robinson, for appellant.

McAllisters & Bergin & John J. McElhinny, for respondent.

By the Court, RHODES, J. The verdict will not be disturbed on the ground that it is contrary to the evidence, upon the issue as to whether any false statements were made by Paul Scoles, the person whose life was insured, for there is a manifest conflict in the evidence upon the points which have been discussed by counsel. It may be doubted whether any misrepresentations were in issue, except such as were specified in the answer, but we express no opinion on the point.

We see no error in the instructions given by the court; and we are of the opinion that the refusal to give those requested by the defendant was not erroneous, except in respect to one instruction. Among the questions propounded to the insured was

the following: "Have you had any serious illness, local disease, or personal injury; and, if so, of what nature, and how long since?" And the answer given was "Not any." There was evidence tending to prove that the insured had consumption, or tubercles upon the lungs, and tubercles upon the brain. The defendant requested this instruction: "You are also instructed that a tubercular affection of the lungs, or tubercles upon the lungs, or tubercles upon the brain, or consumption, would either of them constitute a local disease, within the meaning of that term, as used in the application of Paul Scoles." We think such diseases as those mentioned in the proposed instruction would clearly come within the definition of a local disease; and that the jury should have been so instructed, as matter of law. It was not enough that the jury were instructed that, if Paul Scoles had had a serious local disease, then the plaintiff could not recover; but the defendant had a right to have them instructed that a particular disease, in respect to which there was evidence before them, came within the meaning of the term *local disease*, as used in the application of the insured.

Judgment and order reversed, and cause remanded for a new trial.

UNITED STATES.

PETER HAMILTON, executor of Duke W. Goodman, *vs.* THE
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. In
Equity.

(9 Blatchf. 234. Circuit Court of United States, So. Dist. New York, 1871.)

Effect of war. Mutual company.—In March, 1858, a mutual life insurance company of New York issued to G. a written policy on his life. G. was, at the time, a citizen of, and a resident in, Alabama, and continued to be such until his death in June, 1866. The policy was for life, subject to the payment of an annual premium on or before a specified day, and contained a provision, that, in case G. should not punctually pay such premium, the policy should cease and determine, and all previous payments made thereon should be forfeited to the company. In due season, in March, 1859, 1860, and 1861, G. paid to M., an agent of the company at Mobile, Alabama, the accruing premiums, and they were received by the company at New York. Afterwards, and in March, 1861, the company withdrew all their agencies from Alabama, and had no agent in that State until 1869. G., after 1861, paid no further premiums on the policy. He was always ready to pay, but did not pay because of the revocation of the agencies, and because the insurrection against the government of the United States prevented lawful intercourse between Mobile and New York. The restrictions against intercourse continued until May, 1865. Afterwards, and before March, 1866, G. applied to the company at New York, to receive the premiums in arrear, with interest. It refused to do so or to recognize the policy as subsisting. The plaintiff, as executor of G., renewed the application, but it was refused, on the ground that the policy was forfeited. He then filed this bill, praying for a decree declaring the policy to be subsisting and not forfeited, and directing the payment of the amount insured by it, less the unpaid premiums and interest thereon: *Held*, that the plaintiff was entitled to such decree, though the defendants were a mutual insurance company.

BLATCHFORD, J. The plaintiff is a citizen of Alabama; his testator was, during all the period covered by the transactions in this case, a citizen of Alabama, residing and domiciled therein, and the defendants are a corporation created by the State of New York.

The defendants, by their proper officers, made a written contract with Duke W. Goodman, the plaintiff's testator, dated March 24th, 1858. The contract was what is commonly known as a policy of life insurance. It was signed by the officers of the corporation, and made in its name, and was not signed by Goodman, but was delivered to and accepted by him. The material provisions of the policy are these: "This policy of insurance wit-

Hamilton v. The Mutual Life Insurance Company of New York.

nesseth, that the Mutual Life Insurance Company of New York, in consideration of the representation made to them in the application for this policy, and of the sum of one hundred and seventy-seven dollars and fifty cents to them in hand paid by Duke W. Goodman, and of the annual premium of one hundred and seventy-seven dollars and fifty cents, to be paid on or before the second day of March in every year during the continuance of this policy, do assure the life of the said Duke W. Goodman, of Mobile, in the county of Mobile, State of Alabama, in the amount of five thousand dollars, for the term of his natural life." There is then a stipulation on the part of the company to pay the sum insured to the assured, his executors, administrators, or assigns, in sixty days after due notice and proof of interest, (if assigned or held as security,) and of the death of the assured. There is then a declaration that the policy is accepted by the assured on certain express conditions; that in case the assured shall, without the consent of the company, previously obtained and indorsed on the policy, pass beyond certain specified limits, or visit certain specified parts of the United States, or be or reside in certain specified places, or do certain specified things, or die from certain specified causes, the policy shall be null, void, and of no effect. Then follows this provision: "It is also understood and agreed, by the within assured, to be the true intent and meaning hereof, that, . . . in case the said Duke W. Goodman shall not pay the said annual premium on or before the day hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine; and it is further agreed by the within assured, that, in every case where this policy shall cease, or become null or void, all previous payments made thereon shall be forfeited to the said company." At the foot of the policy, on its face, were these words, in print: "Agents of the company are authorized to receive premiums when due, but not to make, alter, or discharge contracts, or waive forfeitures." On the back of the policy were these words, in print: "Receipts heretofore by the company of premiums after the day on which they fell due were by the assured and the company considered acts of grace or courtesy, and as forming no precedent in regard to future payments of premiums on the policy; and all future receipts of the company of

premiums after due, are viewed and understood by the parties in interest as acts of courtesy of the company, and in no case to be considered a precedent, or a waiver of the forfeiture of the policy, according to the condition expressed therein, if any future payment of premiums be omitted on the day it falls due."

The defendants had, on the 2d of March, 1849, issued to the wife of the said Duke W. Goodman a policy for \$5,000 on the life of her husband, subject to the annual premium of \$177.50, on an application made February 28th, 1849, when Mr. Goodman was thirty-seven years of age. The defendants are organized on the mutual plan, and made, under their charter, a dividend on the 1st of February, 1853, whereby there was added to the policy in favor of Mrs. Goodman the sum of \$415.37 at that date, as a principal sum in which Mr. Goodman's life was insured, subject to all the terms of the policy, in addition to, and in like manner as, the \$5,000, but without any addition of premium to be paid. On the 1st of February, 1858, a like dividend was made, whereby the further sum of \$567.68 was added to the same policy, as a like principal sum. These dividends were sums of money representing excesses of premium paid by Mrs. Goodman beyond what was found to be necessary to be retained by the company in respect of its risks on the policy, and were applied by the company on behalf of Mrs. Goodman, to the purchase for her of paid up insurances with the company, on the same life, in the principal sums so added to the policy. But, although no increased premium beyond the \$177.50 was payable in respect of these additions, or in respect of the policy by reason of these additions, such premium of \$177.50 was annually payable in respect of the whole policy, embracing the \$5,000 and the additions, — the additions being placed upon the same footing with the \$5,000, in respect to all the stipulations of the policy, in like manner as if they had been part of a sum in which the life insured was insured at the inception of the policy, at the annual premium of \$177.50. These added sums were at the risk of the policy, with the \$5,000, and recoverable from and payable by the company, at the death of Mr. Goodman, only if the \$5,000 was recoverable and payable. Under this state of facts, the policy in favor of Mrs. Goodman was surrendered to the defendants, and they accepted its surrender, and, in place of it, issued the policy of the 24th of March, 1858. It bore the same number as the policy of March 2, 1849,

Hamilton v. The Mutual Life Insurance Company of New York.

and appears to have been regarded as a continuation of it, with only the change as to the recipient of the sum insured at the death of Duke W. Goodman, for the defendants transferred to it and indorsed upon it, as sums insured by it, the said several sums of \$415.37 and \$567.68, which had been so added to the policy of 1849.

On the 2d of March, in each of the years 1859, 1860, and 1861, Mr. Goodman paid to Thomas W. McCoy, the agent of the defendants at Mobile, the sum of \$177.50, as the annual premium mentioned in the policy. For the payments of 1859 and 1860, he was furnished, on each occasion, with a receipt signed, on behalf of the company, by its secretary, dated at the office of the company in New York, and countersigned by McCoy, as agent. The receipt of 1859 specifies the sum paid as renewing the policy "from the 2d day of March, 1859, to the 2d day of March, 1860." The receipt of 1860 specifies the sum paid as renewing the policy "from the 2d day of March, 1860, to the 2d day of March, 1861." On the margin of each one of the receipts of 1859 and 1860 were these words, in print: "N. B. — The agreement is mutual (see application and policy), that, unless the premium is paid on or before the day it becomes due, the policy is forfeited and void." For the payment of 1861, Mr. Goodman received a receipt signed by McCoy, as agent of the company, and dated Mobile, March 2d, 1861, specifying the sum paid as the renewal premium on the policy "from date unto 2d of March, 1862." The payment of March 2d, 1861, was remitted by McCoy to the defendants at New York, and was received by them there by March 26th, 1861. Afterwards, and on that day, the defendants, by their president, addressed a letter from New York to McCoy, at Mobile, in which they said: "On full examination of the Alabama law of 24th February, 1860, we come to the conclusion that we cannot comply with its provisions, and therefore feel obliged to withdraw all our agencies from the State. We write to each policy holder to remit premiums directly to us in future. Will you be kind enough to address them for us, as we cannot tell where the parties now live. Our assured are not covered against actual warfare of any description, whether it be by collision with the Northern States or any other power. This does not apply to non-combatants." McCoy was the principal agent of the company in Alabama. They had other agents

Hamilton v. The Mutual Life Insurance Company of New York.

in that State. After sending such letter of March 26th, 1861, the company had no agent in Alabama until some time in the year 1869. Mr. Goodman died at Mobile, June 6th, 1866. He had not made any payment of the annual premium on the policy after the payment made March 2d, 1861.

Under these circumstances, the bill in this case is filed, setting forth that, on the 2d of March, 1862, and on every 2d of March thereafter during his lifetime, Mr. Goodman "was ready and willing to pay the several annual premiums, as the same respectively became payable," "but that he did not, on or after the 2d of March, 1862, pay said annual premiums or any or either of them, because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead, and because the then existing insurrection and rebellion against the government of the United States had interrupted and prevented all lawful intercourse, by mail or otherwise, between the city of Mobile, where the said Duke W. Goodman resided and then was, and the city of New York, where the said company resided and had its office and place of business;" that, on the 16th of August, 1861, under the authority of the act of Congress of July 13th, 1861, the President of the United States, by proclamation, declared that the inhabitants of the State of Alabama were in a state of insurrection against the United States; that all commercial intercourse between the State of Alabama and the inhabitants thereof, and the citizens of other States, was, and would remain, unlawful, until such insurrection should have ceased or been suppressed; and that all goods, chattels, wares, and merchandise coming from the said State of Alabama into other parts of the United States, without the special license and permission of the President, would be forfeited to the United States; that such restrictions and prohibitions and liabilities to forfeiture continued until May 22d, 1865, and that, until the proclamation of the President, issued on the 2d of April, 1866, the inhabitants of the State of Alabama could have had no standing in this court; that, immediately after the removal of the prohibition of intercourse, Mr. Goodman applied to the company at New York, to receive from him whatever of such annual premiums might be found in arrear, together with interest thereon, and offered to do whatever he was bound to do for the pres-

Hamilton v. The Mutual Life Insurance Company of New York.

ervation or restitution of his rights under the policy, but the defendants refused to entertain such proposals, and denied that Goodman had any rights in the premises; that, after such refusal, Goodman died; that the plaintiff, immediately after his appointment as executor, caused application to be made to the company, at New York, to receive from him whatever of the annual premiums might have been in arrear at the time of the death of Goodman, together with interest thereon, and offered to pay the same, or to abate the same from the amount of the policy, and to do whatever else he was required to do, and gave notice, and offered to make due proof of the death of Goodman, but the company refused to receive said premiums, or to accept such proof, or to pay said policy, or the additions thereto, or any part thereof; that the company pretends that the policy was forfeited by the non-payment of premium; that any other compliance than as aforesaid with the terms and conditions of the policy was, without any act or default of Goodman, suspended and prohibited, and rendered impossible; and that it is contrary to equity and good conscience that a forfeiture of his valuable rights should be worked thereby. The prayer of the bill is, that the rights of Goodman, and of the plaintiff as his executor under the policy, may be decreed to be valid and subsisting, and not to have been lost by forfeiture or otherwise, the plaintiff being ready and willing, and offering to pay to the company all such sums of money, together with interest thereon, as may appear to the court to be justly and equitably due for premiums on the policy; that the company may be enjoined from asserting any forfeiture of the policy or of the rights of the assured, or of the plaintiff, under the same; and that the defendants may be decreed to pay to the plaintiff the amount thereby assured, with such additions thereto as have accrued and been made or credited to Goodman under the same.

The answer avers, that if Goodman had been ready and willing to pay the annual premiums falling due March 2d, 1862, and thereafter, it would have been unlawful for him to have made such payments, and equally unlawful for the defendants, after the 16th of August, 1861, to have received such payments and continued the policy in force; that no payment has been made on the policy to the defendants, since the 2d of March, 1861; that none was offered or tendered to be made until after June, 1865;

Hamilton v. The Mutual Life Insurance Company of New York.

that the policy expired and ceased to exist, by its terms, on the 3d of March, 1862; that, at the time the policy was issued to Goodman, Thomas W. McCoy was the agent of the defendants at Mobile, in and for the State of Alabama; that the appointment of McCoy as such agent, in and for said State, was revoked by the defendants in March, 1861; that Goodman had notice thereof; that since that time the defendants have not had any agent in and for the State of Alabama; that the citizens of the State of Alabama, and that State, on the 12th of April, 1861, rebelled against, and instituted a civil war against, the government of the United States, and organized a government in hostility thereto; that thereupon all the citizens and inhabitants of that State, and the said Goodman, a citizen and resident thereof, became and were from thenceforth alien enemies, and so continued to be up to and until the cessation of said hostilities, in May, 1865; that the restrictions and prohibitions and liabilities to forfeiture declared by the proclamation of August 16th, 1861, continued until the 22d of May, 1865; that, after the 16th of August, 1861, and before the 22d of May, 1865, it was unlawful for the defendants to insure the life of Goodman, or to receive from him, or credit him with, any premium on the policy; and that such state of insurrection and war, of itself, terminated the policy, and all the rights and interests of Goodman or his assigns therein, and also terminated his membership of said company, and all his rights and privileges as a member thereof, and all right thereafter to participate in the investments, earnings, and profits thereof.

The third section of the act incorporating the defendants provides, that "all persons who shall hereinafter insure with the said corporation, and also their heirs, executors, administrators, and assigns, continuing to be insured in said corporation, as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation, and no longer." The thirteenth section of the same act provides, that "any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment, due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company." On the 22d of February, 1848, a resolution was

Hamilton v. The Mutual Life Insurance Company of New York.

adopted by the board of trustees of the company, providing, "that any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium or periodical payment due from him to the company, shall not share in the profits of the company, and all previous payments made by him or her shall enure to the benefit of the company."

The principle of law on which the defendants contend that the war terminated the existence of the policy is the familiar one, that an executory contract of continuing performance, made before the breaking out of a war with an alien enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is *ipso facto* dissolved by the declaration of war, which operates, for that purpose with a force equivalent to that of an act of Congress. *The William Bagaley*, 5 Wallace, 377, 407; *Hanger v. Abbott*, 6 Wallace, 532, 536; *Esposito v. Bowden*, 4 Ellis & Blackburn, 963, and 7 Ib. 763; *Reid v. Hoskins*, 4 Ellis & Blackburn, 979. Assuming that Goodman could not pay the annual premiums on the policy without commercial intercourse with the defendants at New York, he being a resident citizen of Alabama, the argument is, that the policy was executory; that the vital principle of the contract is the payment of the annual premium by Goodman, and the sequent liability of the company to pay the amount insured, in case of the death of Goodman during the period covered by the payment of premium; that the continued existence of the policy depended on the punctual payment of the premium, every year, by Goodman; that, by the express terms of the policy, the non-payment of the premium relieved the defendants from liability; that, in this respect, the contract was executory, and its continued existence absolutely demanded continued intercourse and dealings between the parties; and that the contract is, therefore, brought within the very definition of the authorities, as an executory contract, of continuing performance.

Where a contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, the only effect of the war is to suspend its operation, and, on the return of peace, the rights of the parties under it may be enforced. In the case of *Manhattan Life Ins. Co. v. Warwick*, 20 Grattan, 614,¹ in March, 1871, the court of appeals of

¹ *Ante*, vol. 2, p. 168.

Virginia, by a majority of three judges against two, held, that a policy of life insurance, in a like situation with the one at bar, in the particulars involved in the question now under consideration, was suspended, but not dissolved, during the continuance of the late civil war. The view taken by the majority of the court was, that the contract was altogether executory on the part of the company, in the sense that they had done nothing yet towards the performance of it on their part; that it had, however, been largely executed on the part of the assured, creating a right which could be defeated only by a default on his part; that this right was a right to the insurance, not merely for one year, but for the life of the assured; that a new contract every year was not necessary to give the right, but only the annual payment of the premium was necessary to prevent the divesting of the right; that the principle, that war dissolves the contract, had not been applied in a single instance to a contract made before the war, and executed by one of the parties, in part, before the war, and where the execution of the contract on his part was to be completed before he was entitled to any performance by the other party, or where the dissolution of a contract made before the war would work a forfeiture; that such an application of the rule would be arbitrary, unreasonable, and immoral; that, when the contract is made before the war, but not executed by either party, and the carrying it into execution will involve a violation of the duty of the parties respectively to their countries, in the new relations which the war has created, in that case, its execution not having been entered upon, and it being uncertain how long the war may last, and prevent the execution of the contract, it may be dissolved, and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit, to be absolved from the obligation of a contract, which, in the changed relations of their countries, cannot be carried into execution; that, on the other hand, if the contract is partly executed, and the rights under it have vested, and it cannot be dissolved without loss or forfeiture to one of the parties, and it cannot be carried into execution consistently with the duty of the parties to their countries respectively while the war lasts, in such case, it should not be dissolved, but only suspended; and that, if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

Hamilton v. The Mutual Life Insurance Company of New York.

In respect to a policy of life insurance in like situation, the court of appeals of Kentucky, in the case of *New York Life Ins. Co. v. Clopton*, 7 Bush, 179,¹ in August, 1870, adopted the view, that the policy of the law does not avoid, because of the intervention of war, a preëxisting valid contract, which a single act, such as the payment of a debt, can perform; that, in such cases, a suspension of remedy during the war is the only effect of the war; that both principle and policy dissolve a contract made before the war for continuing performance, such as partnership or affreightment; that the policy of interdicting the payment of a debt is, that it may aid the enemy in the prosecution of hostilities; that, consequently, suspension of performance until the restoration of peace effectuates the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle of the temporary interdict; that, in that class of cases, it is the contract, and not the performance, that is continuing, and a suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting, or just; that, in such cases as partnership and affreightment, the performance is continuous and unremitting, until the end of the contract shall have been consummated; that, therefore, as supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war; that the reason for dissolution in these two classes of cases is inapplicable to contracts which may be performed by a single act, or by periodical acts, between which there is nothing to perform, and, consequently, no continuity of performance; that, between a single act and such periodical acts, there is no apparent difference in reason or principle; that, therefore, the law, which only suspends the remedy in the one case, cannot consistently dissolve the contract in the other; that, according to this definition, the ordinary contract of insurance does not seem to belong to the class of contracts of continuing performance, so as to be dissoluble because of an intervening war; that, in the case then before the court, the insurance was an executed entirety for the prescribed term, and the only performance which could devolve on the insurer was to pay the stipulated amount, in the

¹ *Ante*, vol. 2, p. 709.

Hamilton v. The Mutual Life Insurance Company of New York.

event of loss insured against, fulfilment of which was not a continuing act, but a single act of a continuing contract; that the consideration, though payable in annual instalments, was, also, an entirety, and full performance was not of the kind technically styled continuing; and that, consequently, the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment.

I have dwelt somewhat at length on the views taken by the Virginia and Kentucky courts, in the cases referred to, because they are the only cases on the question of the effect of the late war, in respect to the dissolution or non-dissolution of a contract of life insurance, where it is assumed that the payment of the annual premiums required intercourse with the enemy, which have met my notice. I have no hesitation in saying, that I concur fully in the conclusions of those courts on the question, and in the views above set forth, on which those conclusions are founded. Even if the policy be regarded, for the purposes of this question, as containing a contract on the part of the assured to pay the annual premiums, though a contract not enforceable by a suit to be brought by the insurer, but enforceable only through the pressure of the stipulation for forfeiture in case of the non-payment of such premiums at the specified times, and even though to pay such premiums requires intercourse with the enemy, yet the case is one where a suspension of performance on the part of the assured will effectuate, as respects the belligerent governments, the whole aim of the law, without dissolving the contract. As regards the obligation of the insurer, the contract was not one at all of continuing performance, although it was a continuing contract. All that the insurer had to do under it was to pay the sum insured, in case a loss insured against should occur, and the annual premiums had been duly paid, and the proper proof of such loss were furnished.

There would seem to be no principle on which it could be held that, in this case, the war dissolved and abrogated this policy, which would not require the court to hold equally that the policy would have been abrogated by the war, if Goodman had died after the 16th of August, 1861, and before the 2d of March, 1862. In such case, Goodman having been alive on the 16th of August, 1861, the court would be asked to hold that the rights of the parties were to be determined according to their *status* at the

Hamilton v. The Mutual Life Insurance Company of New York.

time the proclamation of that date was issued ; and that, although Goodman had punctually paid all previously occurring premiums, and had died without making default, yet, the contract being one contracting for continuing performance by him in paying premiums annually, it was abrogated by the war on the 16th of August, 1861, so that the insurer was released from liability on it. A decision to that effect would shock every sense of justice. Yet it can make no difference that Goodman did not happen to die before the 2d of March, 1862. If the principle is to be applied to this policy at all, it must be applied as of the 16th of August, 1861. If it is not applied as of that date, it cannot be applied as of any other date. Its applicability cannot be made to depend on the question whether, in fact, Goodman survived, after the 16th of August, 1861, until after it became necessary for him to do an act of performance under the contract.

There is another suggestion which seems to me of great force. In all the cases, so far as I have observed, where the doctrine of abrogation has been applied to a contract of continuing performance, requiring, for such performance, intercourse with the enemy, the question arose on ground taken by the defendant in the suit, when sued for the breach of, or to enforce, some stipulation of the contract, which could be enforced against him by suit, that he was absolved from such stipulation by the dissolution of the contract through the operation of a war. The present case is not such a one. The defendants cannot, in respect of their obligation under the policy, set up, as a defence against the payment of the sum insured, the dissolution of such obligation by the war, any more than the maker of a promissory note, given before the war, could set up, after the end of the war, that his obligation to pay the note was abrogated by the war. In respect of the stipulation in regard to the payment of the annual premiums, this is not a suit to enforce such stipulation or any liability under it ; and the party who was, by the contract, to make such payments, does not set up, as a defence against an obligation to make them, a dissolution of the contract by the war.

It is further insisted, on the part of the defendants, that if it is unlawful to insure the property of an alien enemy, it is, *a fortiori*, unlawful to insure the life of an alien enemy ; that such an insurance could not lawfully be made during the existence of a war ; that the acceptance of a renewal premium is virtually a new

Hamilton v. The Mutual Life Insurance Company of New York.

insurance, the obligation of the insurer lasting only for the period for which the premium is paid ; that it matters not whether the alien enemy bears arms in the contest, or is merely a member of the hostile community ; that the insurance of the life of an alien enemy gives aid and comfort to the enemy ; and that, if it were to be held that the life of the plaintiff's testator, and the lives of many others similarly situated, continued to be insured after the breaking out of the war, under policies made before it broke out, then, if the persons insured had died during the war, the amounts or values of the policies would have been property capable of being used by the enemy of the United States in aid of the war against it, because certain to be realized and made available after the termination of the war.

It is not to be conceded, that, under the policy in this case, the acceptance of a renewal premium would have been a new insurance. But an examination of the cases and text-books on the subject of the dissolution by war of contracts of insurance made before the war shows, that the principle on which the rule rests does not extend to avoiding policies insuring property which is exempted by the laws of war from liability to be seized by the government of the insurer's country.

While the rule would avoid a policy insuring the life of one who should become an actual and active enemy of such government, it thus acquiring the right to destroy his life, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy, who remained such in fact, and over whose life there is no belligerent power, on the part of the government of the insurer. Though, by his domicile, he is a technical enemy, so that his property may be lawfully captured as enemy property, yet, as such nominal hostility does not subject his life, like his property, to peril, no belligerent right is affected by continuing the validity of the insurance. "Consequently, in such a case," as is said in *New York Life Ins. Co. v. Clopton*, (before cited,) "neither authority nor principle would avoid the policy, any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation." Nor is it perceived how the amount or value of a policy on the life of an alien enemy who dies during the war can be availed of, to aid the war, by the government of the country of the assured, in any way or to any extent in or to which the amount or value of a

Hamilton v. The Mutual Life Insurance Company of New York.

promissory note made before the war, and falling due during the war, cannot be availed of, to aid the war, by the government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war.

The bill alleges that Goodman was not concerned, directly or indirectly, in bringing on the insurrection and rebellion mentioned in the bill; and that he did not bear arms against the United States during the continuance of such insurrection and rebellion, nor in any way, directly or indirectly, aid or abet the enemies of the United States. The evidence is, that Goodman did not favor secession as a measure of redress for alleged wrongs; that he did not bear arms against the United States; that he was enrolled among the citizens of Mobile for home defence, but was not called into service; that he paid the taxes and assessments which were levied upon him and his property by the power which ruled the State of Alabama; that he contributed to the relief of sick and wounded soldiers, and of the families of absent soldiers; that he held no office, during the war, under any government; that he was over the age for field service in the army, or was otherwise exempted from such service, and was not conscripted, and furnished no substitute for the army; and that he pursued the occupations of civil life during the war. On these facts it cannot be held that any rule of law requires that the policy on the life of Goodman should be regarded as having been dissolved and abrogated by the war. I have assumed, in the discussion hitherto, that Goodman could not, after the 16th of August, 1861, have paid to the defendants the annual premiums which accrued before the 22d of May, 1865, without direct intercourse with them. The fact is so. The bill alleges that Goodman failed to pay such premiums on or after the 2d of March, 1862, "because the agency of the said McCoy, as the said Goodman was informed and believed, had been theretofore revoked, and no one else had been substituted as such agent in his place and stead." The answer alleges, that the appointment of McCoy, as the agent of the defendants at Mobile, in and for the State of Alabama, was revoked by the defendants on or about the 26th of March, 1861, and Goodman had notice thereof, and since that time the defendants have not had any agent in and for the State of Alabama. The state-

Hamilton v. The Mutual Life Insurance Company of New York.

ments of the bill and the evidence show that these allegations of the answer are true, and that defendants had no agent in Alabama from March, 1861, up to January, 1869. In the absence, therefore, of any agent of the defendants in Alabama, it was impossible for Goodman to pay his annual premiums without direct intercourse with the defendants at New York.

The defence is also set up, that the policy, by its terms, ceased to exist by reason of the non-payment of the annual premium that was due and payable on the 2d of March, 1862, and that thereby, also, all previous payments made by Goodman became forfeited to the defendants. It is replied, on the part of the plaintiff, to this defence, that the defendants, by the act of withdrawing all their agencies from the State of Alabama in March, 1861, prevented the payment by Goodman of his annual premiums, and thereby waived such payments, all of which became due after the 16th of August, 1861, the act of the defendants having prevented the payments in Alabama, and the effect of the war being to make such payments at New York, by Goodman, unlawful.

If it was a part of the contract entered into by the defendants, or of their obligations to Goodman under it, that Goodman should have the right to pay his annual premiums to an agent of the defendants in Alabama, and if the defendants were bound to provide in Alabama, during the continuance of the risk on the policy, an agent to receive such premiums, then Goodman was not bound to seek any other recipient of such payments than such agent, and was not bound, for want of any such agent, to pay the premiums directly to the defendants at New York. In the application made in February, 1849, for the policy issued to Mrs. Goodman in March, 1849, Goodman is described as residing in Mobile, Alabama, and as being a wharfinger there. In his application of March, 1858, for the policy of 1858, and in that policy he is described as of Mobile, in the State of Alabama. All the premiums that he paid were, with the knowledge of the defendants, paid at Mobile, to McCoy, their agent there, and were received by the defendants through and from McCoy. Goodman resided in Mobile from 1835 up to his death, and died at Mobile. In the absence of any proof to the contrary, the defendants must be held to have continued to understand that he continued to reside in Mobile. His application for the policy of 1858 was made

Hamilton v. The Mutual Life Insurance Company of New York.

through McCoy, at Mobile; the policy was delivered to him through the hands of McCoy, at Mobile, and bears McCoy's signature, as agent at Mobile; the three payments of premiums in 1859, 1860, and 1861, were made through McCoy, at Mobile, and the receipts therefor bear the signature of McCoy as the defendants' agent. The policy contains on its face the words: "Agents of the company are authorized to receive premiums when due, but not to make, alter, or discharge contracts, or waive forfeitures." It is contended by the defendants that there was no obligation on them to keep an agent at Mobile or in Alabama. Considering the character of the contract, the circumstances under which it was entered into, the fact that Goodman was, with the knowledge of the defendants, a resident citizen of Alabama at all times, the fact that the contract must be regarded as having been entered into, and continued in operation by the defendants, at least as long as they themselves recognized its continuance, that is, until March 2, 1862, with reference to, and in subordination, on their part, to such statute law of the State of Alabama as should be enacted on the subject of their keeping agents in that State, and the fact that the agency of McCoy, having been continued during the life of the policy up to March, 1861, was then withdrawn, it must, I think, be held that the defendants were bound to keep in Alabama an agent to whom Goodman could pay his annual premiums, or could, at least, offer or tender payment, such agent to be appointed in conformity with such statute law; and that, if the absence of such agent was all that prevented the payment of such premiums by Goodman, the defendants are estopped from setting up the non-payment of such premiums at the times stipulated therefor as a defence to this suit.

The Alabama statute on the subject of foreign insurance companies, enacted February 24th, 1860, is in evidence in this case. Its provisions are applied (§ 1190) to life insurance companies not incorporated by the laws of the State of Alabama, whether such companies are or are not organized on the mutual plan. It provides (§ 1180) that no agent of any such company shall take any risk or transact any business of insurance in Alabama, without first procuring a certificate of authority from the comptroller of the State; that, before obtaining such certificate, such agent must furnish to the comptroller a sworn statement showing the

name and locality of the company, the amount of its capital stock, the amount of capital stock paid in, and the act incorporating it, and an instrument authorizing such agent to acknowledge service of process for and in behalf of the company, and consenting that service on such agent shall be taken to be service on the company; that no company incorporated by any other State, or any agent of it, shall transact any business of insurance, unless the company is possessed of at least \$100,000 of actual capital invested in stock of at least par value, or in bond and mortgage on real estate worth double the amount for which the same is mortgaged; and that, on a compliance with these provisions, the comptroller shall issue a certificate thereof, with the authority to transact the business of insurance, to the agent applying for the same. It also provides (§ 1182) that the agent, before taking any risks or transacting any business of insurance in the State, shall file in the office of the judge of probate of the county in which he may desire to establish an agency for the company copies of the statement and instrument aforesaid. It also provides (§ 1183) for the renewal annually of these proceedings. It also provides (§ 1185) that every agent must annually deposit with the assessor of the county in which the agency is established a sworn statement of the gross premiums received for insurance by the company at the agency during the preceding year. It also provides (§ 1186) that such agent, before taking any risk or transacting any business of insurance, must pay certain local fees annually so long as the agency is continued. It also imposes (§ 1188) a penalty of fine and imprisonment for the violation of the provisions of the law. It also provides (§ 1191) that the provisions of the law shall apply when the risk is taken or any insurance business is transacted in Alabama by the agent of any company, whether the policies are signed by the officers of the company in or out of Alabama.

There can be no doubt that the passage of such a statute as this was within the competence of Alabama. That State had a right to impose such terms and conditions as it chose, in granting its assent to the recognition of the defendants in Alabama, and of their rights under policies to be issued in Alabama to citizens and residents of Alabama, and to exact, in its discretion, such security as it thought proper, for the performance of the contracts of the defendants under such policies. It also had a like right to regulate the business of agencies of the defendants in Alabama,

Hamilton v. The Mutual Life Insurance Company of New York.

with reference to future payments to become due on existing policies issued in Alabama to citizens and residents of Alabama. *Paul v. Virginia*, 8 Wallace, 168, 181. The policy in question was in fact issued in Alabama by the defendants to a citizen and resident of Alabama, although it professes to have been delivered as well as signed by the president and secretary of the company. The receipt, by McCoy, of the premium paid at Mobile March 2, 1861, such premium having been received by McCoy as agent, under the authority to that effect on the face of the policy, made the contract of insurance, as respected the period to elapse before March 2, 1862, (even if, as contended by the defendants, such payment of premium created a new contract of insurance for a year,) an Alabama contract, to be governed by the statute law of Alabama. Such receipt of such premium by McCoy was ratified by the defendants. I think the proper construction of the policy, as such policy stood when the payment to be made March 2d, 1862, became due, is, that inasmuch as Goodman was then living, and the obligation of the defendants under the policy was outstanding, the defendants were bound to furnish Goodman with an opportunity, on the 2d of March, 1862, and on every recurrence of the day of annual payment, to pay the premium to an agent of theirs in Alabama. As such payment to the agent would have been the transaction of insurance business in Alabama, the statute of that State required that the agency should conform to the statute. The defendants were bound to be ready to receive performance of the contract by Goodman through an agent in Alabama, such agent to be appointed in accordance with the Alabama statute. McCoy's agency in this case existed after that statute was passed. Such agency was withdrawn in March, 1861. Having been created before the war, it would not have been revoked by the war, at least so far as the right to receive payments of annual premiums was concerned. Payment of the premiums by Goodman to the agent would not have violated any law of war or any duty of Goodman's. *Ward v. Smith*, 7 Wallace, 447, 453; *Conn v. Penn*, Peters' C. C. R. 496, 524, 525; *United States v. Grossmayer*, 9 Wallace, 72, 75.

The evidence shows pecuniary ability and willingness on the part of Goodman to pay the premiums at Mobile, and that the reason why he did not pay them there was the absence of any agent there of the defendants. I see no legal objection to the

Hamilton v. The Mutual Life Insurance Company of New York.

evidence on this subject, either as competent, or as sufficient to prove the facts. If the defendants were entitled to the punctual payment of the premiums, as a condition precedent to their continuing liability from year to year, their prevention of such payment, by the withdrawal of McCoy's agency, and of all other agencies in Alabama, excused Goodman from making the payments punctually, and debars the defendants from setting up such want of punctuality as a defence in this suit. *Williams v. Bank of the United States*, 2 Peters, 96, 102; *Van Buren v. Digges*, 11 Howard, 461, 479.

There is no force in the objection, that the defendants could not, during the war, have received from their agent in Alabama any moneys paid to him there as premiums, or that such moneys would have been confiscated in the hands of such agent, if paid to him. If the agent had been provided, Goodman could have tendered the premium, and the agent could have refused to receive it, because he could not remit it, and because it would be confiscated. The rights of Goodman would thus have been preserved, according to the tenor of the contract. The loss, if any, which would have ensued to the defendants, was a loss incident to the war, and with which Goodman had no concern, and the apprehension or certainty of which could not affect his rights. The unlawfulness of any receipt by the defendants at New York, from Goodman, or any other person in Alabama, during the war, of any moneys paid as premiums, cannot affect any rights of Goodman in respect of having the opportunity of paying such premiums in Alabama, or be set up by the defendants as a ground of forfeiture of the policy in respect of such rights.

Under these views, the contract was only suspended during the war. After the end of the war, the right of Goodman to pay the premiums, which he had been prevented from paying by the action of the defendants, continued in all respects as if the 2d of March, 1862, had not passed. Within a reasonable time after the close of the war, that is, in January or February, 1866, and before the coming around of any 2d of March after the close of the war, an application on behalf of Goodman was made to the defendants at New York, requesting them to recognize the policy, on terms to be arranged. The reply of the defendants was, that they did not recognize the policy as valid, because it had been forfeited by the non-payment of premiums, and they refused to

Hamilton v. The Mutual Life Insurance Company of New York.

receive payment of the premiums in arrear. What thus transpired made it unnecessary for Goodman to tender the premium due March 2d, 1866. In December, 1867, after Goodman's death, an agent of the plaintiff presented to the defendants his claim on the policy, and tendered to them proofs of Goodman's death, and offered to pay any premiums that were in arrear. The reply of the defendants was, that the policy was forfeited, and they would recognize no liability upon it, and would not receive any premiums, or pay any loss upon it, but that they would, as a gratuity, pay what was the surrender value of the policy on the 2d of March, 1862.

The withdrawal of the agency of McCoy, and of the other agencies in Alabama, made it unnecessary for Goodman to seek out McCoy or some other person who had been an agent of the defendants in Alabama, and tender the premiums, as due, to him, even though, as would appear from the evidence, McCoy remained in Alabama, accessible, during a part, at least, of the war. Especially is this so, in view of the fact that Goodman had notice of the revocation of McCoy's agency.

On all these considerations, I am of opinion that the defendants must be regarded as having prevented Goodman from paying his premiums, as due, in Alabama, where he had a right by the contract to pay them, and, therefore, as having waived such punctual payment; that the policy was not and is not forfeited by reason of the non-payment of premiums; that it is a valid and subsisting policy against the defendants; and that the plaintiff was, when he brought this suit, in a position to ask the relief prayed for by the bill.

These views recognize fully all the terms of the policy, and do not interpolate in the contract of the parties any provision, by way of excuse for the non-payment, on the stipulated day, of any premium, which is not within the terms of the contract. It is of the essence of every contract, that, if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance. In this case, the prevention by the defendants of performance by Goodman was equivalent to actual performance, or to a waiver by the defendants of such performance.

But it is urged by the defendants, that Goodman could have paid his premiums at New York; that, if he elected to remain in

Hamilton v. The Mutual Life Insurance Company of New York.

Alabama, where he could not or would not make payment of the premiums, it was his own fault; and that the existence of the war and the prohibition of commercial intercourse between the State of Alabama and the city of New York furnishes no legal excuse for the non-compliance by Goodman with his agreement to pay the premiums on the designated days. Yet the defendants insist, in the answer, that it was unlawful for them, between August 16th, 1861, and May 22d, 1865, to receive from Goodman any premium on the policy; and, on the argument, their counsel insisted that if Goodman had, after the 16th of August, 1861, offered to pay the premiums, as they fell due, it would have been unlawful for the defendants to receive such premiums. It was further insisted that, notwithstanding this, the policy terminated because of such non-payment, for the reason that the intervention of the war, as an excuse for non-payment, was not provided for by the policy. But these arguments are without avail to support the defendants' case. Their inability to receive the premiums, when due, in 1862, 1863, 1864, and 1865, amounted to the same thing as if such premiums had been actually tendered, and the defendants had refused to receive them. Such inability to receive was a dispensing by the defendants with the punctual payment of the premiums, and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk. Such inability was a default on the part of the defendants, preventing Goodman, a citizen and resident of Alabama, from paying the premiums to the defendants at New York, and, therefore, dispensing with the payment of them, as performance by Goodman. The case is not one where the excuse set up is merely inability or impossibility of performance on the part of him who is to perform. It is one where inability, on the part of the party to whom performance was due, to receive such performance — an inability notorious and known to the party owing performance — existed, and is set up by the party to whom performance was due, as a ground for forfeiting the rights of the other party under the contract, because he did not pay what it was impossible and unlawful for his obligee to receive. The cases in the books, which were cited on the part of the defendants, as enforcing strictly the rule that a precedent condition on which, by contract, money is to be paid,

Hamilton v. The Mutual Life Insurance Company of New York.

must be absolutely complied with, were cases in which the impediment to performance existed solely on the part of him who was to be the actor in performance, and were not cases in which the impediment existed either solely on the part of him who was to be the recipient of performance, or was an impediment affecting both parties jointly and equally in extent. The distinction is a sound one; and it would be gross injustice to apply to this case a rule the reason of which has no application to it. The defendants, in effect, say to Goodman: "It was unlawful for us to receive from you your premiums for 1862, 1863, 1864, and 1865, as they became due; it would have been idle for you to have tendered them to us; yet as the contract was that you should pay them at specified times, and you did not pay or tender them at those times, the contract is forfeited, our liability to pay you the \$5,983.05 is at an end, and, besides that, the \$2,307.50 paid to us as premiums on the policies of 1849 and 1858 is forfeited to us." I do not believe a defence of that kind to a policy of life insurance situated like the present one was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind. Indeed, it has often been held, that the intervention of the law will excuse non-performance of a contract, where the operation of the intervention was solely on the party who was to perform, and not at all on the party who was to receive performance. *Wolfe v. Howes*, 20 New York, 197, 201; *Jones v. Judd*, 4 Comstock, 412, 413; *The People v. Tubbs*, 37 New York, 586, 588.

The views I have endeavored to maintain are concisely stated by the court in *Manhattan Life Ins. Co. v. Warwick*, (before cited.) In speaking of the obligation of the insurer, under the policy, to pay the sum insured, the court say: "The company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium, or by hindering or preventing the other party from paying it, or by any disability on its part to receive it, and which prevented the payment, which was not provided for in the contract." In the present case, the defendants are setting up their own disability to receive payment, as a ground of forfeiture. In *New York Life Ins. Co. v. Clopton*, (before cited,) the court say: "To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and

Hamilton v. The Mutual Life Insurance Company of New York.

unreasonably penal, for no better cause than the inevitable non-precise payment of another instalment of premium, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay, when there was legal ability to receive the premiums."

There was, therefore, no forfeiture in this case. Goodman continued to be insured in the defendants' company until his death, and was a member of the company at the time of his death. He was entitled, under the policy, at the time of his death, to all the rights, in respect of the sums insured by the policy, and of all proper increase of such sums insured, as the result of dividends made to members, up to the time of his death, which he could have been entitled to, if the defendants had received and accepted all the annual premiums specified in the policy. The resolution of February 22d, 1848, cannot be interpreted as applying, or having been intended to apply, to a case like the present one. Goodman did not "omit" to pay any premium, in the proper sense of that word. His failure to pay was wholly inactive and involuntary, and was no default on his part, but was, as between him and the defendants, the default of the defendants.

Nor is there any force in the view, that Goodman, being a partner with the other persons insured in the defendants' company, the partnership was dissolved by the war. The relation between him and such other persons, assuming that they were domiciled in New York during the war, because the company is a New York corporation, was not such a relation of partnership as requires the application to it of the rule that a war dissolves a contract of commercial partnership between enemies. The views before stated in regard to the effect of the war on the policy, as a contract between enemies, apply to it equally in its aspect as a policy issued by a company doing business on the mutual plan. The relations of Goodman to the partnership and to his partners, and his duty to it and them, as a member, were created and are to be measured wholly by the terms of the policy, and no different rule can be applied to the policy, because it was issued by a mutual company, than would have been applied to it if it had been issued by a company of which the insured did not, by the insurance, become a member.

Insurance Company v. Wilkinson.

I have carefully considered all the views urged by the defendants and am entirely satisfied that the plaintiff is entitled to a decree, with costs. There must be a reference to a master to take and state an account of the amount due on the policy, with interest, such amount to be computed on the basis before stated, and the defendants to be allowed credit for the unpaid annual premiums.

Charles F. Sanford, for the plaintiff.

Henry E. Davies, for the defendants.

INSURANCE COMPANY *vs.* WILKINSON.

(13 Wall. 222. Supreme Court, 1871.)

Personal injury. — The assured in a life policy, in reply to the question, "Had she ever had a serious personal injury," answered "No." She had, ten years before, fallen from a tree. The criteria of a serious personal injury considered.

Agency. — Insurance companies who do business by agencies at a distance from their principal place of business are responsible for the acts of the agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge.

When these agents, in soliciting insurance, undertake to prepare the application of the insured, or make any representation to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance company, and not of the insured.

Where the agent had inserted in the application for life insurance a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured, it was the act of the company and not of the assured, and did not invalidate the policy.

In error to the circuit court for the District of Iowa; the case being thus: —

The Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk, (where the application was made and the policy delivered,) through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy

was returned to this agent, who delivered it and collected and transmitted the premiums.

On this form of application were the usual questions to be answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue.

Among the questions was this one:—

“Has the party ever had any *serious* illness, local disease, or *personal injury*; if so, of what nature, and at what age?”

And the question was answered:—

“No.”

So, too, after an interrogatory as to whether the parents were alive or dead,—they being, in the case of Mrs. Wilkinson, both dead,—were the questions and answers:—

“Question. Mother’s age, at her death?”

“Answer. 40.”

“Question. Cause of her death?”

“Answer. Fever.”

Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defence was, that the answers as above given to the questions put were false; that in regard to the first one, Mrs. Wilkinson, in the year 1862, had received a serious personal injury, and that in regard to the others, the mother had not died at the age of 40, but at the earlier age of 23, and had not died of fever but of consumption.

As to the first matter, that of the personal injury, the judge (under a rule of practice in the state courts of Iowa, adopted by the circuit court of that district, and which allows the jury in addition to its general verdict to find also special verdicts and answers to interrogatories put) required the jury to respond to certain interrogatories. These and the answers to them were thus:—

“Interrogatory. Did Malinda Wilkinson, in the year 1862, receive a serious personal injury, by falling from a tree?”

“Answer. Yes, injured; not seriously.”

“Interrogatory. Were the effects of such fall temporary, and had these effects wholly passed away without influencing or affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken?”

“ Answer. Yes.”

As to the other matter, the age at which the mother died, and the disease which caused her death, evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the plaintiff's [defendants' ?] objection and exception) to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or of her age at the time ; that the wife was too young to know or remember anything about it, and that the husband had never known her ; and to prove that there was present at the time the agent was taking the application an old woman, who said that *she* had knowledge on that subject, and that the agent questioned her for himself, and from what *she* told him he filled in the answer, which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife.

This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of twenty-three ; did not die of consumption ; and that the applicant did not know when the application was signed how the answer to the question about the mother's age and the cause of her death had been filled in.

In charging the jury, the court said, on the first branch of the case — that relating to the personal injury — that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defence to the action ; but, on the other hand, that if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

On the second branch — that relating to the age of the mother — the court said to the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of

them, and upon the strength of his own judgment, based upon data thus obtained, it was no defence to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

Messrs. *G. G. Wright, Gilmore & Anderson*, for the plaintiff in error.

Messrs. *McCrary, Miller & McCrary*, *contra*.

Mr. Justice MILLER delivered the opinion of the court.

On the first branch of the case the court said to the jury that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defence to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for the defendant that if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence in a few days, it is clear that the serious aspect of the case was not a true one. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them.¹

Passing then to the second branch of the case. The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground, that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily over-estimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing; against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said

¹ *Wilkinson v. Connecticut Mutual Life Insurance Co.*, ante, p. 565.

in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement; and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of

the grossest injustice and dishonesty. And the reason for this is, that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity, where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or to establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well considered judgments by the courts of this country.¹ Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is

¹ *Plumb v. Cattaraugus Ins. Co.* 18 New York, 392; *Rowley v. Empire Ins. Co.* 36 Ib. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Connecticut, 526; *Combs v. The Hannibal Savings and Ins. Co.* 43 Missouri, 148.

the work of the assured, and if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *primâ facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not

Insurance Company v. Wilkinson.

communicated to the person with whom he deals.¹ An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.²

In the fifth edition of American Leading Cases,³ after a full consideration of the authorities, it is said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers."⁴

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

Judgment affirmed.

¹ *Beebe v. Hartford Ins. Co.* 25 Connecticut, 51; *The Lycoming Ins. Co. v. Schollenberger*, 8 Wright, 259; *Beal v. The Park Ins. Co.* 16 Wisconsin, 241; *Davenport v. Peoria Ins. Co.* 17 Iowa, 276.

² *Savings Bank v. Charter Oak Ins. Co.* 31 Connecticut, 517; *Horwitz v. Equitable Ins. Co.* 40 Missouri, 557; *Ayres v. Hartford Ins. Co.* 17 Iowa, 176; *The Howard Ins. Co. v. Bruner*, 11 Harris, 50.

³ Published A. D. 1872, vol. 2, p. 917.

⁴ *Rowley v. Empire Ins. Co.* 36 New York, 550.

LIFE INSURANCE COMPANY *vs.* TERRY.

(15 Wall. 580. Supreme Court, 1872.)

Suicide. — In an action upon a policy of life assurance containing a condition that if the assured shall "die by his own hand," the policy shall be void; if the death be caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

ERROR to the circuit court for the District of Kansas. (Reported below, *ante*, vol. 2, p. 31.)

H. E. Davies & J. T. Davies, for the plaintiff in error.

W. W. Nevison, *contra*.

Mr. Justice HUNT delivered the opinion of the court.

The request for instructions made by the counsel of the insurance company proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity, does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result; yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature, and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitoria*, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement, does not bring the case within the rule, if the insured possesses his ordinary reasoning faculties.

The case of *Borradaile v. Hunter*, reported in 5th Manning & Granger,¹ is cited by the insurance company. The case is found also in 2 Bigelow, Life and Accident Insurance Cases,² and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended to do so, but that at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: "It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death in either case had ensued. In these and many other cases that might be put, though strictly speaking the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." In delivering the opinion of the court, Erskine, J., says: "All that the contract requires is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and the question whether at the time he was capable of understanding the moral nature and quality of his purpose is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself." Chief Justice Tindal dissented from the judgment. In speaking of the verdict he says: "It is not, perhaps, to be taken strictly as a verdict that the deceased was *non compos mentis* at the time the act was committed, for if this latter is the meaning of the jury, the case

¹ Page 639.² Page 280.

would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion, or insanity."

This authority was followed in *Clift v. Schwabe*,¹ where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that whether the party is a voluntary moral agent is not in issue.

These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards. Coke said: "A little madness deprives the lunatic of civil rights or dominion over property, and annuls wills." But, to exempt from responsibility for crime, he says, "Complete ignorance of the knowledge of right and wrong must exist." Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis* or sound mind. Lord Erskine² defined it to be the absence of any practicable delusion traceable to a criminal or immoral act. In Pritchard on the Different Forms of Insanity (vol. 1, p. 16; and see 1 Shelford on Lunatics, 46) will be found somewhat lengthy definitions of insanity by Lord Lyndhurst.

The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue.

In *Hartman v. Keystone Insurance Co.*³ the doctrine of *Borradaile v. Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

In *Dean v. Mutual Life Insurance Co.*⁴ the courts of Massachusetts held substantially the doctrine of *Borradaile v. Hunter*.

In Kentucky, in *St. Louis Life Insurance Co. v. Graves*,⁵ the court were divided upon the question of the soundness of *Borra-*

¹ 3 Common Bench, 437.

³ 21 Pennsylvania State, 466.

² Defence of Hadfield.

⁴ 4 Allen, 96.

⁵ 6 Bush, 268.

daile v. Hunter, but held unanimously that, where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided.

In *Cooper v. Massachusetts Life Insurance Co.*¹ the doctrine of *Dean v. American Life Insurance Co.* was affirmed; the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity.

In *Nimick v. Insurance Company*,² McKennan, circuit judge of the United States for the Western District of Pennsylvania, held that if the assured comprehended the physical nature and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act.

On the other hand, in *Estabrook v. Union Insurance Co.*³ the judge at the trial instructed the jury "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover." This decision was sustained by the supreme court of the State of Maine.

In the State of New York the question arose in *Breasted v. Farmer's Loan and Trust Co.*⁴ In an action upon the policy the defendants pleaded that the deceased committed suicide by drowning himself in the Hudson River, and died by his own hand. To this the plaintiff replied that the assured was "of unsound mind and wholly unconscious of the act." The defendants demurred. The supreme court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea. The case afterwards came before the court of appeals of that State,⁵ when it was held that the provision in the policy had reference to a criminal act of self-destruction; that the self-destruction of the insured while insane, and incapable of discerning between right and wrong, was not within the provision.

In the case of *Gay v. The Union Mutual Life Insurance Co.*⁶ it was held that if the deceased was conscious of the act he was committing, if he intended to take his own life, and was capable of understanding the nature and consequences of it, the policy

¹ 102 Massachusetts, 227.

² 10 American Law Register, new series, 102.

³ 54 Maine, 224.

⁴ 4 Hill, 73.

⁵ 4 Selden, 299.

⁶ 2 Bigelow, 4.

was void ; but if the insured destroyed himself while acting under an insane delusion, which overpowered his understanding and will, or if he was impelled to the act by an uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow,¹ was the result of a careful deliberation between Judges Woodruff and Shipman at a circuit court of the United States held by them jointly.

In his work on Insurance,² Mr. Phillips, after citing the cases, closes thus : “ And I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition.”

There is a conflict in the authorities which cannot be reconciled.

The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis, — the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis, — that the act was not the voluntary, intelligent act of the deceased.

The causes of insanity are as varied as the varying circumstances of man.

— “ Some for love, some for jealousy,
For grim religion some, and some for pride,
Have lost their reason ; some for fear of want,
Want all their lives ; and others, every day,
For fear of dying, suffer worse than death.”³

When we speak of the “ mental ” condition of a person, we re-

¹ *Supra*.

² Section 894.

³ *Armstrong on Health*, book 4, v. 84, cited in *Shelford on Lunatics*, In. 1, 43.

fer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions, and mania which accompany irritability, or the weakness which results from an excess of vital functions, indigestion, and sleeplessness, are all the results of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

We have not before us the particular facts on which the questions of the sanity of Terry were presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed; whether he had abandoned his accustomed habits and pursuits, and adopted new and unusual ones; from a quiet, orderly man, had become disorderly, vicious, or licentious; that his fondness for his wife and children changed to dislike and abuse; that jealousy, pride, the fear of want, the fear of death had overtaken him. He may have realized the state supposed by the counsel in arguing *Borradaile v. Hunter*, viz., that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or having been bled, he might have torn away the bandages. Whether he swallowed poison or did the other insane acts, might result from the same condition of body and mind.

Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these or other forms overthrew Terry's reasoning faculties, in other words destroyed his consciousness, his judgment, his volition, his will, he remained the form of a man only. The reflecting, responsible being did not exist. In the language of the successful counsel in *Borra-*

daile v. Hunter, "in these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into."

That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject.¹ It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form, — breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely, in the same direction.

Dr. Ray, cited by Fisher,² approves the charge of the judge in *Haskell's case*, where he says: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"

The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him, would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge, that upon proof of the facts assumed, the jury must acquit him.³

We think a similar principle must control the present case, although the standard may be different.

We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there

¹ See Blandford on Insanity: "Impulsive Insanity."

² Fisher on Insanity, p. 83.

³ *Freeman v. People*, 4 Denio, 9; *Willis v. The People*, 32 New York, 719; *Seaman's Society v. Hopper*, 33 Ib. 619; *The Marquess of Winchester's case*, 6 Reports, 23; *Combee's case*, Moore, 759.

 Cammack v. Lewis.

can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance the contract of insurance was made between Mrs. Terry and the company; the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, commit suicide, take his own life, or die by his own hands. With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso.

Judgment affirmed.

Mr. Justice STRONG dissented.

CAMMACK vs. LEWIS.

(15 Wall. 643. Supreme Court, 1872.)

Wager policy. Assignment. Division of fund. — A owing B \$70, by B's advice takes out a policy of life insurance in \$3,000 for seven years, — he, B, agreeing to pay the premiums during the term. A dies intestate seven months after the policy is issued, leaving a wife and children. B, the creditor, produces A's note to him for \$3,000, dated on the same day with the policy, but given confessedly without consideration, and also an assignment of the policy to him. There is also found among A's, the debtor's, papers one signed by B, the creditor, (but not by A,) dated three months after the policy had issued and been assigned, by which B, the creditor, agrees that in case of A's, his debtor's, death, and the payment to him, B, by the insurers, of the full amount of the policy, he will pay to the "wife of A, (the debtor,) his heirs and assigns," one third of the amount so received. B, the creditor, having received from the insurers the whole \$3,000, pays the wife, who has not yet taken letters of administration on her husband's estate, a third, less some small and admitted deductions; which third — ignorant of the full extent of her rights, acting hastily and without consideration, and largely influenced by the advice of one of her husband's friends, himself ignorant of many facts of the case — she received as for her proportion of the sum paid under the policy. She afterwards takes out ad-

Cammack v. Lewis.

ministration on her husband's estate; and in her capacity of administratrix sues for the remainder of the \$3,000. *Held*, 1st, that so far as B was concerned, the policy being one of \$3,000 to secure \$70 was a sheer wagering policy; without any claim to be considered as one meant to secure the debt. 2d, that there was nothing beyond the execution of the note for \$3,000 to show that A was a participant in any fraud on the insurers, but on the contrary it rather appearing that he looked upon B as a friend to whom he was willing to trust the policy. *Held*, further, and as a consequence, that B was bound to account to A's estate for the whole sum, less any deductions for premiums or other just offset; and the assignment of the policy was valid only to that extent. 3d, that the third which the widow received, having been received by her when ignorant of the full extent of her rights, and received hastily, without consideration, and when influenced by the advice of a friend of her husband, while ignorant of many facts of the case, did not conclude her. Independently of this, that if she had a right as administratrix to recover the \$3,000, the receipt by her of \$1,000 before she took out administration could not defeat the right.

APPEAL from the supreme court for the District of Columbia; the case being thus:—

One John E. Lewis, of Washington, D. C., being in bad health and owing by note \$70, which he was not then able to pay, to a certain C. Cammack, Jr., tailor, for clothing, procured June 19th, 1868, at Cammack's suggestion, an insurance on his life, in the New Jersey Mutual Life Insurance Company, which had an agency in Washington, for \$3,000. The policy, No. 2885, was for seven years. Cammack paid the premium for the first year; and immediately after the policy was made out, Lewis gave to Cammack a note for \$3,000, there having been no consideration for the same, and assigned the policy to him. On the 9th of January following—that is to say, seven months after the issuing of the policy—Lewis died, leaving a widow and two children; and Cammack having paid, of course, but for the first year's premium, a sum of \$25. After Lewis's death there was found among his papers a document, in Cammack's handwriting, thus:—

“WASHINGTON, D. C., September 15, 1868.

“This agreement witnesseth that I, the undersigned, for value received, do bind myself, and heirs, or legal representatives, to pay unto Maggie Lewis, wife of John E. Lewis, his heirs and assigns, the sum of one thousand dollars, in event of the said John E. Lewis's death; the said amount being first realized by me from an insurance on his (the said Lewis's) life, duly assigned to me, and held by me, otherwise this agreement to be held null and void. Number of the policy 2885, in the New Jersey Mutual Life Insurance Company. “C. CAMMACK, JR.”

Among Lewis's particular friends was a Mr. W. E. Chandlee, of Washington, whom he was in the habit of consulting on business matters. About a week before his death, Lewis showed to him the draft of a will of which he desired Chandlee to be executor. And with a view of enabling Chandlee to properly administer things, he dictated to him a list of all the debts which he, as he said, expected would be brought in against his estate, and which he desired Chandlee as his executor to pay. Among them was the \$70, due by the note to Cammack for clothing, and "\$25 on account of life insurance." Chandlee knew what this last item was for, without explanation; for Lewis had consulted him previously to his life's being insured, and told him that it was insured very soon after the policy issued. "His statement to me," said Chandlee in giving an account of the matter, "was that his life was insured by Mr. Cammack, in the New Jersey Mutual Life Insurance Company, for the sum of \$3,000, and that at any time that he was able to pay to the said Cammack the amount of premiums that the said Cammack should have paid on account of the policy, with interest on the same, and the amount he owed Cammack for clothing, that Cammack would restore the policy to him."

Cammack was not present at any part of this account, and when it was told to him he denied the correctness of Lewis's understanding of the matter.

Lewis did not live to sign his will, and so Chandlee did not become his executor in form. Still, "feeling," as he said, "disposed to render the same assistance to his widow as if the will had been signed, and Lewis having put into his possession for safe-keeping his private papers, among which was the memorandum set out above and signed by Cammack," he went and saw Cammack, who had already made application to the insurance company for the amount of the insurance. Chandlee's account of the whole transaction was thus:—

"Cammack told me that it might save time and trouble to have a written requisition from Mrs. Lewis, upon the company, to pay the money over to him, (Cammack,) as they might consider it their duty, otherwise, to pay it over to her, in which case it would occasion delay; but he didn't know that it would be necessary. I remarked to him that I didn't think it would make any difference as far as his claim was concerned, whether the

Cammack v. Lewis.

money was paid to him directly, or to Mrs. Lewis ; that I felt sure she would settle the matter, as called for in the agreement, and I would take the responsibility that she would do so. I then saw Mrs. Lewis and asked her if she intended to settle the matter of insurance in which Cammack was interested, according to the agreement in my possession. She expressed her willingness that it should be settled on that basis, just as Mr. Lewis had provided that it should be. Mr. Cammack then wrote a requisition for Mrs. Lewis to sign, and gave it to me, saying, ' Take this to Mrs. Lewis, and see if she will sign it. If she objects, and the company will not pay the money to me, I will let them pay it to her, and trust to her for a settlement.' I took the requisition to Mrs. Lewis, told her what it was for, and she signed it. It was thus : —

“ WASHINGTON CITY, D. C., *January 20th*, 1869.

“ TO THE NEW JERSEY MUTUAL LIFE INSURANCE CO. :

“ Gentlemen, — The claim of C. Cammack, Jr., of said city, secured by assignment of policy No. 2885, in your company, on the life of my late husband, John E. Lewis, is a just and legal claim, and it is my desire and direction that your company pay to said Cammack the proceeds thereof.

“ Witness my hand and seal on the aforementioned date.

“ Witness : “ MRS. J. E. LEWIS.” [SEAL.]

“ W. E. Chandlee,

“ James Griffith.”

“ On this request Cammack made an affidavit thus : —

“ DISTRICT OF COLUMBIA, }
“ Washington City, } ss.

“ C. Cammack, Jr., of city aforesaid, being duly sworn, saith that he was acquainted with John Edward Lewis, deceased, during his lifetime ; that he was the person insured under policy No. 2885, in the New Jersey Life Insurance Company, which said policy was assigned to the deponent ; that the full and true sum of three thousand dollars was and is now due to me from said John Edward Lewis or his estate ; and that no part of the said sum has been paid this deponent by said Lewis or any one on his behalf.

“ C. CAMMACK, JR.

“ Sworn to and subscribed before me this 23d January, 1869.

[SEAL.]

“ J. H. MCCUTCHEN, *Notary Public.*”

Cammack v. Lewis.

On this request and affidavit Cammack got the \$3,000 from the insurance company, and sent to Mrs. Lewis his check for \$950, with a memorandum in one corner. The whole was thus : —

“ No. 459.

WASHINGTON, D. C., February 5, 1869.

“ NATIONAL METROPOLITAN BANK.

“ Pay to . . . Mrs. John E. Lewis, . . . or order, nine hundred and fifty dollars. C. CAMMACK, JR.

“ \$950.00

“ In full for her proportion of policy No. 2885, in the New Jersey Mutual Life Insurance Company.”

The check, of course, was in professed discharge of the paper dated September 15th, 1868, *supra*, p. 827 ; the sum sent being one third of the \$3,000, less a deduction of \$25 for the premium paid for insurance, and for another small account which Cammack had against Lewis.

Mrs. Lewis went with Mr. Chandlee to the bank, where under his eye she indorsed the check and drew the money, \$950.

At a subsequent date, having taken out letters of administration on her husband's estate, in which as already mentioned there were besides herself two children to participate, she filed a bill to recover the remainder of the \$3,000.

Cammack set up, by way of defence, that the policy was taken out under an agreement between Lewis and himself that he should pay the premiums for the seven years the policy was to run, and in consideration of those payments, and what Lewis owed him, he should, in the event of Lewis's death during the life of the policy, receive two thirds of the amount of the policy, and pay over the other third to Lewis's wife or his heirs ; and in support of this he relied on the instrument signed by himself, dated September 15th, 1868, and, as already stated, found among Lewis's papers ; and relied on the further fact of that sum (with a small and just deduction) having been received by Mrs. Lewis, on the policy. But the defence was not sustained ; and the court below, holding that Cammack held the policy under the assignment as a mere security for what Lewis owed him, decreed that he should pay over the balance after deducting that small sum. From that decree Cammack appealed.

Mr. T. T. Crittenden, for the appellant.

Messrs. A. McCallum & T. J. Durant, contra.

Mr. Justice MILLER delivered the opinion of the court.

If the transaction as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70, is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretence to be a *bonâ fide* effort to secure the debt; and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned to him by Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception; probably to impose on the insurance company.

Under these circumstances, we think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent.

Whether Lewis was a participant in the fraud does not fully appear. Such conversations of his as are proved tend to show that he looked upon Cammack as a friend to whom he was willing to trust the policy assigned, and that he never supposed more would be claimed by Cammack than what he owed him. It is also probable that he believed he would survive the life of the policy, and with the single exception of the note for \$3,000, given by him without consideration, there is nothing proved against him inconsistent with that view of the matter, and with his fair dealing. At all events, we do not see such evidence on his part of a corrupt transaction, as to forbid the court from doing justice between his administratrix and Cammack, after the amount secured by the policy has been paid by the company to the latter.

The receipt of one third of the insurance money by the complainant does not, we think, under all the circumstances of the case, conclude her as a settlement of the matter in dispute. It is

Ripley v. Railway Passengers' Assurance Company.

obvious that she was ignorant of the full extent of her rights ; that she acted hastily and without due consideration, and was largely influenced by the advice of Mr. Chandlee, who had been her husband's friend and adviser, and who was prompted to do what he did by Cammack, while in ignorance of many of the facts of the case.

Besides, the bill in this case, as appears on its face, is brought by her as administratrix, and the receipt by her of the one third paid on the policy was before any administrator had been appointed. If she has a right to recover all the \$3,000 as administratrix, it could not be defeated by her receipt of \$1,000, paid to her in her own right before any administration had been taken out on Lewis's estate.

On the whole, we are of opinion that the decree of the supreme court should be affirmed, and it is *So ordered.*

RIPLEY vs. RAILWAY PASSENGERS' ASSURANCE COMPANY.

(16 Wall. 336. Supreme Court, 1872.)

Accident insurance. — *Travelling on foot* is not travelling by public or private conveyance within the meaning of a policy of insurance against injury by accident while travelling by public or private conveyance.

APPEAL from a judgment of the circuit court¹ of the United States for the Western District of Michigan in favor of the defendants. (Reported below, *ante*, vol. 2, p. 738.)

George Gray, for the plaintiff in error.

H. C. Robinson, *contra*.

The opinion of the court was delivered by

CHASE, C. J. That the deceased was *travelling* is clear enough ; but was travelling on foot travelling by public or private conveyance ?

The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or rather, what understanding must naturally have been derived from the language used ? It seems to us that walking would not naturally be presented to the mind as a means of public or pri-

¹ There is a mistake in the report of the case below (*ante*, vol. 2, p. 738) in stating the trial there reported to have been in the *district* court.

Ripley v. Railway Passengers' Assurance Company.

vate conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, travelling within the terms of the policy. There is nothing to show that it was not.

Judgment affirmed.

Note. — The distinction between this case and *Northrup v. Railway Pass. Assur. Co.* 43 N. Y. 516 ; *S. C.*, ante, vol. 2, p. 129, seems to be this ; that the journey of Ripley, so far as it was made by any vehicle, had entirely terminated before the injury occurred. He had left a steamboat, at Muskegon, and was travelling from thence on foot to Dalton, his place of destination, a distance of eight miles. In the other case, the insured was merely changing her place from one vehicle to another, though the distance was some seventy rods. It was clearly the purpose of the insurance policy to cover the risk of accident till the end of the journey by carriage ; and as the policy was probably sold to the insured by a railway ticket agent, together with a ticket for conveyance to the place of destination, it must have been known that the insured would need to change vehicles, as she was attempting to do at the time of the accident. But even if this supposition be opposed to the fact, the case may still, perhaps, be supported. It could hardly be doubted that, if the insured were injured while taking half a dozen steps from the cars to a hack, the company would be liable ; but the difference between such a case and the actual one would seem to be only a difference of degree.

INDEX.



ABANDONMENT.

See DEBTOR AND CREDITOR, 4.

ACCEPTANCE OF POLICY.

See CONTRACT, 1.

ACCIDENT.

See WARRANTY, 1.

ACCIDENT INSURANCE.

1. INJURY CAUSED BY LIFTING. — On an insurance against bodily injury by accident or violence, provided that the accident operated by external causes, insurers *held* liable for an injury to the spine, caused by lifting a heavy burden in the course of business. A surgeon called for the plaintiff, to whom he had given a certificate of serious injury, contradicting it, and alleging that it was collusively given, allowed to be treated as adverse. *Martin v. The Travellers' Insurance Company*, 197.
2. DROWNING. — H. effected with the defendants a policy of assurance, whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown. *Held*, in the exchequer chamber: First, that assuming H. died from drowning, that was death by "accident" within the meaning of the policy. Secondly, that it was a question for the jury whether H. died from the action of the water or from natural causes. *Trew v. The Railway Passengers' Assurance Company*, 218.
3. DROWNING. — H. effected with the defendant a policy of assurance, whereby it was agreed that if he should receive or suffer bodily injury from any accident or violence, in case such accident or violence should cause his death

 Accident Insurance.

within three months after the occurrence of such accident or violence, the sum assured should be payable to his personal representatives. The policy contained a proviso that no claim should be payable under the policy in respect of death or injury by accident or violence, unless such death or injury should be occasioned by some external and material cause operating upon the person of the insured, and unless, in the case of death, such death should take place from such accident or violence within three calendar months from the time of the occurrence of such accident or violence. During the continuance of this policy H. went into the sea to bathe. While in a pool about one foot deep, he became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards. A few minutes afterwards, he was found lying dead with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The immediate cause of his death was suffocation by the water, but the pool being shallow, such suffocation would not have taken place had he not been incapable of helping himself, in consequence of the insensibility above mentioned. *Held*, that H.'s death was caused by accident, within the meaning of the policy. *Reynolds v. The Accidental Insurance Company*, 223. See 8, *infra*.

4. PAROL AGREEMENT TO INSURE. — The plaintiff being about to take the cars in haste, gave the defendant's agent a sum of money as premium for one day's insurance against accident; the agent agreeing to issue policies at once. *Held*, that in case of an accident the company were liable though no policies were in fact issued; there being no limitation upon the power of the agent concerning the issuance of policies. *Rhodes v. The Railway Passenger Assurance Co.* 677.
5. THE INTEMPERANCE of the assured, subsequent to the injury, is no defence to the company. *Ib.*
6. SUBSEQUENT INJURIES. — A clause requiring full particulars of the accident held not to require a disclosure of injuries happening subsequently to the injury alleged to be covered by the policy. *Held*, also, that if the original injury was insufficient alone to disable the insured, the company will not be liable though subsequent injuries happen of such a nature as to aggravate the first injury, and thereby to disable the insured. *Ib.*
7. EVIDENCE. INSANE PERSON. CONCEALMENT. — Defendant issued an accident policy of insurance upon the life of M., who, prior to procuring the policy, had been a canvasser for applications for insurance with defendant. The president had directed him to be cautious, as the company did not wish to insure insane persons, &c. Some time prior to the issuing the policy M. had been insane; had been sent to an asylum, and discharged cured; and from that time forward had been sane. He did not disclose the fact of his former insanity upon applying for a policy, but stated there were no circumstances rendering him peculiarly liable to accident. *Held*, that the conversation with the president had no tendency to show a fraudulent concealment of material facts, and that it was not error in the court to charge, that the conversation had no bearing on the application. Also *held*, that the court was correct in charging that if the deceased did not conceal any facts which in his own mind were material in making the application, the policy was not

Accident Insurance.

- void, — no inquiries being made. *Mallory v. The Travellers' Insurance Company*, 696.
8. DEATH BY DROWNING. — By the terms of the policy the sum insured was to be paid if the insured "shall have sustained personal injury caused by any accident, . . . and such injuries shall occasion death," &c. *Held*, that if a wound received by deceased, being produced by an accident, did not cause death, but did cause him to fall into the water, where he was drowned, then the death was accidental and defendant liable. *Ib*.
9. PRESUMPTION AGAINST SUICIDE. — Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries, or of a suicidal act of deceased, the presumption of law is against the latter. *Ib*.
10. NEGLIGENCE. — An accident insurance company *held* liable on a policy for an accident which occurred while the insured was getting into a conveyance while in motion. *Champlin v. The Railway Passenger Assurance Co.* 736.
11. PROOF OF DEATH. — An accident policy of insurance stipulated that no payment in case of accidental death should be made, unless notice of the injury and death should be given within thirty days of the happening of either, and sufficient proof furnished the company of such injury, and that the death was caused solely by such injury, and ensued within three months from the happening thereof. Written notice was given that the death was from "an injury received in the bowels, while working in a hay-field, producing peritoneal inflammation." Proof was subsequently furnished by affidavit of the physician, that deceased "was killed by accident, and that the accident was occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles, producing peritoneal inflammation," &c. This notice and affidavit made out a *prima facie* case of death from injury resulting from accident." *The North American Life and Accident Insurance Co. v. Burroughs*, 755.
12. AN ACCIDENTAL STRAIN, resulting in death, is an accidental injury within the meaning of the policy. *Ib*.
13. VARIANCE. — The widow, for whose benefit the insurance was made, in her affidavit stated that the injury happened while the deceased "was unloading hay, when he accidentally strained himself;" the affidavit of the physician stated the death was "from an accident by exertions in hauling in hay;" the proof on the trial was that the injury was from a blow from a pitchfork while hauling in hay. *Held*, that the variance was immaterial. *Ib*.
14. CHANGE OF OCCUPATION. — In his application, the assured stated his occupation to be an "earthen-ware manufacturer;" there was no evidence that he had changed his occupation, but the proof was that, while on a visit at a farm, he had assisted in loading hay, and there received his death injury. *Held*, that this was not a change of occupation within the meaning of the policy. *Ib*.
15. TRAVELLING ON FOOT is not travelling by public or private conveyance within the meaning of a policy of insurance against injury by accident while travelling by public or private conveyance. *Ripley v. Railway Passengers' Assurance Company*, 832, and note, 833.

 Action. Administration.

ACTION.

1. **GUARDIAN AD LITEM.**—In the case of a life policy for the benefit of the wife of the insured, and in event of her death the amount to be payable to their children, or to their guardian if they are under age; *held*, the event having happened, that suit on the policy was properly brought in the name of a guardian *ad litem*. *Price v. The Phoenix Mutual Life Insurance Company*, 625.
2. **PARTIES.**—Where, by a policy of life insurance, the sum insured is made payable to the “assured, his executors, administrators, and assigns,” for the benefit of a third person, an action thereon is properly brought in the name of the personal representative of the assured, who, by the policy, is constituted trustee of an express trust, within the meaning of section 113 of the Code. *Greenfield v. The Massachusetts Mutual Life Assurance Company*, 702.
3. Where, in such action, upon motion of the insurance company, the beneficiaries named in the policy are ordered to be and are made parties, the company is precluded from objecting that they are not properly joined with it as defendants. *Ib.*
4. **NON-FORFEITURE ACT OF MASSACHUSETTS.**—In an action brought against a Massachusetts life insurance company, the complaint admitted the non-payment of premiums due, but alleged that there was due upon said policy a certain sum; under a statute of said State, (“the non-forfeiture act,” passed April 10, 1861,) which provided that no life policy, issued by a company chartered by that commonwealth, shall be forfeited for non-payment of premium, until the expiration of a term of temporary insurance therein provided for, and also alleged notice and proof of death, and a promise of the company to pay the sum claimed to be due. The answer denied that there was anything due upon the policy, under the provisions of the statute referred to in the complaint. *Held*, that the action was based upon the policy, and not upon an account stated; that the answer put in issue the alleged indebtedness upon the policy, and the question was whether the temporary policy provided for by said statute was in life at the time of the death of the assured; and upon this issue the testimony of an experienced actuary, that he had made the computation, in accordance with the statute, and that the temporary policy created thereby had expired prior to the death of the assured, was competent, and the rejection thereof error. Also *held*, that plaintiff had no right to substitute upon the trial, for the cause of action set out in the complaint, one founded upon an account stated, and thereby exclude this defence for the reason that the answer did not set up affirmatively an error, or fraud in the statement of the account. *Ib.*

ADMINISTRATION.

LETTERS OF ADMINISTRATION are *primâ facie* evidence of the death of the person on whose estate they are granted, and where there is no issue made upon them, are conclusive evidence of the fact of death. *Cunningham v. Smith*, 766.

Admissions. Agency.

ADMISSIONS.

See AGE, 2, 3.

AGE.

1. **DECLARATIONS. WAIVER.** — In an action on a policy of insurance upon the life of W. M., which contained a warranty that W. M. did not exceed the age of fifty-nine years, *held*, that after the death of W. M. his unsworn declarations as to his own age, made several years before the date of the policy, were not admissible in evidence in proof of his age. *Westropp v. Bruce*, 285.
2. The agent of the insurers, at the time of effecting the policy, having expressed himself satisfied as to the age of the life insured as represented to him, *held*, that this did not dispense with the necessity of proving the age as stated in the warranty. *Ib.*
3. **MISREPRESENTATION CONCERNING.** — Covenant upon a policy of insurance upon the life of M. L., reciting that M. L. had declared his age did not exceed forty-three years on a day named, and containing a proviso that if anything stated in such declaration should be untrue, then the policy should be null and void. The plaintiff averred that the age of M. L. did not exceed forty-three years on that day, upon which fact issue was joined. At the trial, there being conflicting evidence as to the age of M. L., and some evidence having been given that the agent of the insurers was satisfied with the representation made by him as to his age, and acquiesced in it, the judge left it to the jury to say, whether the age of M. L. exceeded forty-three years or not, or whether the insurers had adopted the age as given in by him, and acquiesced in it; and the jury found a verdict for the plaintiff, at the same time declaring that there was misrepresentation of the age, but not intentional; and that the insurers, by their agents, had adopted the age as given in and acquiesced in it. Upon motion to set aside this verdict for misdirection of the learned judge, *held*, that upon this finding, a verdict ought to have been directed for the defendants; and although they did not call for such a direction at the trial, and made no objection to the charge at that time, the defendants might move to set aside the verdict, upon payment of the costs of the trial, the jury having found in their favor the only fact in issue between the parties, viz., that the age of M. L. had been misrepresented by him. *Murphy v. Harris*, 289.

AGENCY.

See MISTAKE, 2; POLICY, 9; RESTRICTIONS UPON RESIDENCE AND TRAVEL, 4; WAR.

1. **CREDIT. PAYMENT.** — A sub-agent, employed by the agent of an insurance company to solicit applications for insurance, collect premiums, and deliver policies, has no general authority, by virtue of such employment, to give credit or receive anything but cash in payment. *The Continental Life Insurance Company v. Willets*, 606.
2. **PREMIUM.** — Where an application for insurance provides that any neglect to pay the premium when due shall render the policy void, and forfeit all payments made thereon, and that the policy shall not be binding upon the

 Agency. Annuity.

- company until all premiums due thereon shall be received by the company, or some one authorized to receive the same, and during the lifetime of the insured, the insurance company is not liable on a policy which has not been delivered, upon evidence that a sub-agent of its agent has, without its authority, taken from the insured a promissory note of a third person in part payment of the first premium, in the absence of anything showing that such sub-agent was allowed to substitute his own personal liability to the company in place of the premiums. *Ib.*
3. PART-PAYMENT. CREDIT. PRESUMPTION. — The payment of a part of the premium upon a policy based upon such an application does not, by itself, raise a presumption of an understanding that time was to be given for the payment of the balance. *Ib.*
4. EVIDENCE. — Where a witness for plaintiff has testified to certain admissions as having been made by defendant's agent in the course of a conversation, it is competent for defendant to prove, by another witness, who was present immediately after such admissions were alleged to have been made, and while the conversation continued upon the same subject, subsequent statements by such agent, which, though not directly contradicting the alleged admissions, would have a tendency, if believed, to convince the jury that such admissions were not in fact made as testified to by the prior witness. *Ib.*
5. PARTNERS. DEATH. — Where an agency of an insurance company was given to two persons as partners; *held*, that the agency of the firm ceased with the death of one, and that it could not be carried on by the survivor. And after the insured had notice of such death, payments made to the survivor were not to be deemed as valid. *Martine v. The International Life Assurance Co.* 700.
6. APPLICATION FILLED OUT BY COMPANY'S AGENT. — Insurance companies who do business by agencies at a distance from their principal place of business are responsible for the acts of their agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge. *Insurance Co. v. Wilkinson*, 810.
7. When these agents, in soliciting insurance, undertake to prepare the application of the insured, or make any representation to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance company, and not of the insured. *Ib.*
8. Where the agent had inserted in the application for life insurance a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured, it was the act of the company and not of the assured, and did not invalidate the policy. *Ib.*

ANNUITY.

See ASSIGNMENT, 2; DEBTOR AND CREDITOR, 5-7.

Application. Assignment.

APPLICATION.

See AGENCY, 6; PROPOSAL; WARRANTY, 2.

ARRESTMENT.

1. ARRESTMENT (GARNISHMENT). — An arrestment of the contents of a policy of life assurance, where the debtor died before any new premium fell due; held competent and effectual. *Strachan v. M' Dougle*, 412.
2. ASSIGNATION (ASSIGNMENT). — An arrestment held preferable to an uninitiated assignation of a policy of life assurance, although the policy had been delivered along with a letter of assignation to the assignee in England. *Ib.*
3. QUESTION, whether an arrestment remains effectual after a new premium of insurance has been paid under a policy, and a new year has commenced. *Ib.*

ASSIGNMENT.

See ARRESTMENT; DEBTOR AND CREDITOR, 17; INSURABLE INTEREST, 8; SUICIDE, 3; TITLE TO POLICY, 5.

1. Assignees for value of a life policy hold subject to the equities affecting the same; 30 & 31 Vict. c. 144, has not altered their position in this respect. *British Equitable Ins. Co. v. Great Western Ry. Co.* 264.
2. ANNUITY. PRESUMED INTENT. — An insurance company made an advance of £29,980 to A, who granted in their favor a heritable annuity over his entailed estate, and assigned to them certain policies on his life, reserving power to redeem the annuity, and thereon to obtain a reconveyance of the policies held by the company at the date of redemption; the policies assigned had been in force for several years, and several of them entitled the holder to participate in the profits of the offices which granted the policies. A died without redeeming the annuity; the company recovered out of the proceeds of the policies their whole advance, and an additional sum of £1,118, which had accrued by way of *bonus* on the participating policies. Held, by a majority of the court, in reference to the whole terms and circumstances of the transaction, that, although the assignation of the policies to the company was, *ex facie*, out and out, yet, according to the true and manifest intent of parties, the object of it merely was to reproduce to the company the sum of £29,980; that the absolute terms of the assignation might be restrained under the equitable powers of the court, within the limits of the true and manifest intent of parties; and that any surplus recovered by the company beyond £29,980, belonged to the executors of A. *Marquess of Queensberry v. Scottish Union Insurance Co.* 428.
3. AN ASSIGNMENT BY A WIFE and her husband, for the benefit of his creditors, of a policy of insurance on his life, obtained for her sole and separate use, and made payable to her and her assigns, is valid. *Emerick v. Coakley*, 601.
4. The forbearance of the creditors of the husband, and the granting an extension of time for the payment of his debts, is a valid consideration for an assignment by the wife. *Ib.*
5. DELIVERY. — A life insurance policy, by writing under seal duly acknowledged, was assigned to H. in trust for assignor's children; it was not delivered in person to H., but placed in the safe of a firm of which assignor was

Bankruptcy. Cases reversed, overruled, affirmed, or denied.

a member and found there upon his death: *Held*, a valid trust as against creditors, assignor being solvent at date of assignment. *Estate of Trough*, 750.

6. PREMIUM PAID BY ASSIGNEE. — One has a right to have his life insured with the money of another and then to assign the policy to him absolutely. *Cunningham v. Smith*, 766.
7. A policy of insurance was issued to S. on his life, the premiums being paid by C., to whom S. immediately made an absolute assignment of the policy. The evidence in the case insufficient to submit to the jury that the assignment was as collateral. *Ib.*

BANKRUPTCY.

See DEBTOR AND CREDITOR, 15.

PAYMENT OF PREMIUMS AFTER BANKRUPTCY. — The mortgagor of a policy of insurance became bankrupt, but notwithstanding his bankruptcy, continued to pay the premiums on the policy: *Held*, that the premiums so paid were in the nature of salvage moneys, and ought to be repaid, with interest at 4 per cent., out of the policy moneys. *Shearman v. British Empire Mutual Life Assurance Company*, 271.

BONUSES.

See MARRIAGE SETTLEMENT, 3.

OMISSION TO PAY PREMIUMS. — W. insured his life in 1812, and paid the premium till 1816, when, owing to removing to another house, he omitted to pay it. But in 1817 he got a new policy for the same amount at the same premium as the policy of 1812, and this premium was duly paid till 1854, when W. died. Certain bonuses attached to policies of 1812. W.'s executor now filed a bill praying that the company be ordered to pay all bonuses, as if the policy had been dated and continued since 1812; but no direct evidence was given beyond the above facts, and W. had made no similar application till 1839. *Held*, (affirming the decree of the M. R. and L. JJ.), that the bill showed no right to any equity against the insurance company, for there was nothing to show that the policy of 1812 had not been forfeited. *Windus v. Tredegar*, 242.

CASES REVERSED, OVERRULED, AFFIRMED, OR DENIED.

1. *Billiter v. Young*, 6 El. & B. 1. VOID AND VOIDABLE. See *Armstrong v. Turquand*, 350, 359 *et seq.*
2. *Dillard v. Manhattan Life Ins. Co.* p. 546. EFFECT OF WAR. See note, p. 548.
3. *Flinn v. Tobin*, Moody & M. 368. CONCEALMENT. See *Abbott v. Howard*, 294, 308.
4. *Halford v. Kymer*, p. 4. INSURABLE INTEREST. See note to *Reed v. Royal Exch. Assur. Co.* 2.
5. *Lancaster's case*, Law R. 14 Eq. 72, note. ESTIMATING VALUE OF POLICY. Denied. *Holdich's case*, 272.
6. *Lea v. Hinton*, p. 92. DEBTOR AND CREDITOR. See *Freme v. Brade*, 182, 192.

Cases reversed, overruled, affirmed, or denied. Concealment.

7. *Miles v. Connecticut Life Ins. Co.*, ante, vol. 2, p. 173; *S. C.* 3 Gray, 580. WARRANTY. Denied. *Horn v. Amicable Life Ins. Co.* 712, 713.
8. *Miller v. Brooklyn Life Ins. Co.*, ante, vol. 2, pp. 35, 757. WAIVER. See note to *Edge v. Duke*, 67, 71.
9. *Northrup v. Railway Pass. Assur. Co.*, ante, vol. 2, p. 129; *S. C.* 43 N. Y. 516. TRAVELLING ON FOOT. See note to *Ripley v. Railway Pass. Assur. Co.* 832, 833.
10. *Ripley v. Ætna Ins. Co.* 30 N. Y. 136, 164. WAIVER. See note to *Edge v. Duke*, 67, 70.
11. *Ripley v. Railway Pass. Assur. Co.*, ante, vol. 2, p. 738. TRAVELLING ON FOOT. Affirmed. *S. C.* p. 832.
12. *St. John v. American Life Ins. Co.*, ante, vol. 1, pp. 549, 558; *S. C.* 13 N. Y. 31. INSURABLE INTEREST. Denied. *Franklin Life Ins. Co. v. Hazzard*, 559, 562. See note, p. 564.
13. *Sands v. New York Life Ins. Co.*, ante, vol. 2, p. 123; *S. C.* 59 Barb. 556. EFFECT OF WAR. Affirmed. *S. C.* p. 726.
14. *Trew v. Railway Pass. Assur. Co.*, ante, vol. 2, p. 588. DROWNING. Reversed. *S. C.* p. 218.
15. *Valton v. National Loan Fund Life Assur. Soc.*, ante, vol. 1, p. 436; *S. C.* 20 N. Y. 32. INSURABLE INTEREST. Denied. *Franklin Life Ins. Co. v. Hazzard*, 559, 562. See note, p. 564.
16. *Vose v. Eagle Life Ins. Co.*, ante, vol. 1, p. 161; *S. C.* 6 Cush. 42. WARRANTY. See *Horn v. Amicable Life Ins. Co.* 712, 713.
17. *Walsh v. Ætna Life Ins. Co.* p. 571. WAIVER. See note to *Edge v. Duke*, 67, 71.
18. *Wise v. Mut. Ben. Life Ins. Co.*, ante, vol. 2, p. 46. CONCEALMENT. MILITARY SERVICE. Affirmed. *S. C.* p. 595.

CHANGE OF RISK.

See CONSUMMATION OF CONTRACT, 2.

ISSUE. — A party who was subject to epileptic fits proposed his life for insurance with a company who undertook to effect insurance on diseased lives. His representatives averred that the contract was completed, and sued the insurance company for the sum contained in the policy. The company denied that any contract had been entered into. *Held*, that the company were entitled to an issue, as to whether, during the negotiations between the parties, there had been a material change of risk, although they merely averred that the epileptic fits had been more frequent and violent, and did not aver that there was an accession of any new and different disease. *Wemyss v. The Medical Life Assurance Society*, 496.

CHAPLAIN.

See MILITARY SERVICE.

CONCEALMENT.

See ACCIDENT INSURANCE, 7.

1. MISREPRESENTATION. MEDICAL ATTENDANT. — In July, 1863, B. negotiated for the insurance of his life in the plaintiff's office, and signed a declara-

Concealment.

tion as to his health and habits of life, with a reference to his usual medical attendant, who certified that he was in good health. After examination by the medical officer of the company, he was accepted as a first-class life, but at an advanced rate of premium on account of his excessive corpulence. In August, pending the completion of the contract, B. went to consult a physician, who discovered that he was in a dangerous state of health, and suffering from disease of the kidneys, and warned him that care and abstinence from stimulants were necessary. B. never communicated this circumstance to the office. In September the premium was paid, and the policy effected. Eight months afterwards B. died suddenly from the effects of his disease. The declaration signed by B. in July required him, amongst other things, to name "his latest, if other than his usual, medical attendant." *Held*, that such declaration was continuing up to the date of the completion of the contract, and that the non-communication of his visit to the physician in the interval vitiated the policy. *The British Equitable Insurance Company v. The Great Western Railway Company*, 264.

2. FRAUD.—A policy of life insurance is vitiated by not communicating all material facts to the company at the time of the contract made, and it is immaterial whether such facts have been withheld by fraudulent design or innocent omission. *Abbott v. Howard*, 294.
3. CONSTRUCTION. DISEASE SHORTENING LIFE. REFEREES.—Where a declaration on which a policy is grounded states that the person about being insured has no diseases or habits having a tendency to shorten life, the omission to mention a disease not having a continuing tendency to shorten life does not render the policy void. *Rose v. Star Insurance Company*, 346.
4. WAIVER.—To an action brought by the administratrix of a party who had effected a policy upon his own life in the D. & G. Assurance Co., which policy contained a proviso that in case the said assured had been guilty of fraud in procuring it, &c., the policy should be void, and all moneys paid in respect of it should be forfeited to the company, the latter pleaded that the party assured had at the time of effecting the policy, in conjunction with the agent of the company, fraudulently concealed the fact of his having met with an accident, from the effects of which he was then suffering paralysis, and had withheld all knowledge from the company of the uninsurability of his life. The plaintiff replied that the company, after they had knowledge of the facts pleaded, received a second premium from the insured, and thereby elected to affirm the policy. *Held*, upon demurrer to the replication, (MONAHAN, C. J., *dissentiente*,) that the meaning of the proviso was that the policy should be void in the particular event, in case the company should elect to treat it so; and that inasmuch as they had elected to treat it as subsisting by the receipt of the subsequent premium, they were liable for the amount. *Armstrong v. Turquand*, 350.
5. POST MORTEM.—In a reduction by an insurance office of a policy of life insurance on the grounds of concealment or non-statement of important facts and of untrue averments as to the health of the party insured, with the fraudulent intention of misleading the pursuers, issue allowed "whether by misrepresentation or undue concealment, or non-statement of material facts as to the health, &c., the pursuers were induced to grant the policy;"

 Concealment.

although the defenders contended that the term "wilful" ought to be inserted in the issue, in order to obviate a possible case of non-statement of facts insured being proved, the existence of which might only be discovered *post mortem*: *Held*, that a pursuer is not bound to take an issue exhausting his whole averments on the record as to fraud, &c., but it is sufficient if the issue be within the record, and relevant to support the conclusion of the action. *Sprott v. Ross*, 421.

6. STATEMENTS IN PROPOSAL. BELIEF. LATENT DISEASE.—The proposal for a life insurance and relative declaration, which formed the basis of the contract in the policy subsequently granted, contained a declaration that the party had no disease or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstance or information touching health or habits of life, with which the insurers ought to be made acquainted, was withheld. *Held*, that this imported a declaration only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease, material to the risk, and did not import a declaration against any latent imperceptible disease, that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time. *Hutchison v. The National Loan Fund Life Assurance Society*, 444.
7. "GOOD HEALTH."—Defendant issued a policy upon an application wherein the applicant stated that the insured was in good health, and usually enjoyed good health; that no circumstance which might make the risk more than usually hazardous was concealed or withheld. To a question, whether the insured had had certain diseases, among them disease of the heart, palpitation, spitting of blood, &c., the answer was "See surgeon's report;" it was also stated that the insured had no physician. The examining physician, in answer to a question whether the insured had cough, occasional or habitual, or expectoration, or occasional or uniform difficulty in breathing, answered, "No cough; walking fast up stairs or up hill produces difficulty in breathing." In fact the insured had raised blood from two to two and a half years prior to and down to his death; and a physician had been consulted and prescribed therefor. He had failed in health prior to the application; and he died three months after the issuing of the policy of pleuro-pneumonia. The referee rendered judgment against defendant. *Held*, there was a fraudulent concealment and misrepresentation of material facts, and an order of the general term setting aside the judgment was proper. *Smith v. The Aetna Life Insurance Company*, 708.
8. STATEMENTS AS TO HEALTH.—An applicant for insurance, upon his examination, prior to the issuing of the policy, was asked to name the physician usually employed by him, and, if he had none, then to name any other who could be applied to for information upon the state of his health. His answer was, "None." The fact was that he had occasionally applied to Dr. N. for remedies for a severe cough of long standing, shortness of breath, and expectoration, during six or seven years, and Dr. N. had prescribed for him. He had also applied to another company for insurance, and had been examined by Dr. F., the medical adviser of that company,

 Concealment. Consummation of Contract.

and the application had been refused, on the certificate of that examination. The examination was made on the 9th of October, and his answers to the written questions, on the application in this case, were made on the 18th of the same month. He stated to Dr. F. on that occasion that he discharged from his lungs very profusely at times, that he had coughed all of the previous night, and "coughed up" a good deal, that the expectoration was streaked with blood, and that he had night sweats sometimes for several nights in succession. This was proven to have been chronic. *Held*, that as the applicant knew that both of these physicians could give important information as to his health, and did not mention them, but on the contrary said, in effect, that there were none who could give such information, he had been guilty of a fraudulent concealment, vitiating the policy. *Held*, also, that it was not for the jury to say whether the applicant was justified in giving the answer which he did; and that a charge that it was for them to decide was erroneous. *Horn v. The Amicable Mutual Life Insurance Co.* 712.

9. **WARRANTY.**—The statements in the application, though made part of the policy, *held*, to be representations merely, and not warranties. *Ib.* and note, 715.

CONSPIRACY.

RECOVERY OF MONEY PAID BY COMPANY. KNOWLEDGE.—The plaintiff having paid the amount of a life insurance policy to the defendant, brought an action to recover back the same, alleging that the insurance had been effected upon a fraudulent combination and confederacy between the plaintiff's medical examiner, the defendant, and the insured. *Held*, that to sustain the complaint it was necessary to establish knowledge of the alleged combination and conspiracy on the part of the insured. *The National Life Insurance Co. v. Minch*, 690, and note, 693.

CONSUMMATION OF CONTRACT.

1. **LETTER.**—A party who was subject to epileptic attacks proposed to insure his life with a company who undertook to effect insurance on diseased lives. The company had no settled rates of insurance, but fixed the amount of premium in each particular case according to its own circumstances. In this case they transmitted to their agent a letter to the party who proposed the insurance, accepting the proposal, on receiving a premium of more than twenty per cent. Owing to an unfavorable change in the party's health, the agent did not deliver this letter. *Held*, that as this letter contained the first specification of the terms on which the proposal would be held as accepted, no completed contract of insurance was constituted till it had been communicated to the party, and he had intimated his acceptance of the terms and conditions it contained. *Wemyss v. The Medical Life Assurance Society*, 487.
2. **CHANGE OF RISK.**—A company for the insurance of diseased lives offered, on certain terms and conditions, to insure the life of a person who at the time was laboring under epilepsy. In an action on the policy (after the party's death) against the insurance company, it was averred by them that their offer had never been accepted by the party wishing to be insured; and

Consummation of Contract.

- that the court found that no concluded contract of insurance was or could be constituted till the letter containing the offer of the insurance company had been communicated to the party wishing to be insured, and he had intimated his assent to the terms and conditions it contained. An issue was thereupon sent to the jury, — Whether a contract of insurance was concluded by the communication of the letter, and assent given to its terms and conditions. *Ruled* by the presiding judge, (and the ruling excepted to,) that the assent which must be proved to have been intimated was the assent of the party himself, and that no assent of any one else, whether his wife, or the trustees for his creditors, or the creditors themselves, or his agent, was sufficient. *Wemyss v. The Medical Life Assurance Society*, 499.
3. The presiding judge further refused, on the call of the pursuer, to direct the jury, that to satisfy the terms of the issue it was sufficient to prove that the letter of the insurance company was communicated to persons authorized to act for the party in the management of his affairs and was assented to by such persons on his behalf. This ruling excepted to. *Ib.*
 4. Verdict for pursuer, finding that a concluded contract of insurance had been entered into. Verdict set aside as contrary to evidence, and new trial granted. *Ib.*
 5. Under an alternative issue, whether, prior to any contract or agreement of such insurance having been concluded, “a change amounting to a material alteration of the risk and of the circumstances of the proposal, had taken place in the health and condition” of the party proposed to be insured. *Ruled* by the presiding judge, (not excepted to, and afterwards confirmed by the opinions of the court,) that it would be a change material to the risk if the disease of the party became aggravated in its character from what it was at the time of the proposal of the insurance, and that it was not necessary, to constitute such a change, that the disease should alter from one kind of disease to an entirely different one. *Ib.*
 6. Verdict for pursuer, finding that there had been no such change. Verdict set aside as contrary to evidence, and new trial granted. *Ib.*
 7. DELIVERY OF POLICY. — It appeared in this case that an application for insurance had been duly made, a policy based thereon signed and sealed by the company and sent to an agent at the place of residence of the applicant, and that the policy had been offered to his son (the applicant being away) upon payment of a certain sum and signing a certain note for the premium. The note was given, but the agent declined to deliver the policy; saying that he would keep it till the return of the father, and would wait for the money and keep the policy good in the mean time. *Held*, that the contract of insurance was not consummated. *Heiman v. The Phoenix Mutual Life Insurance Co.* 612.
 8. DELIVERY OF POLICY. — Where a wife made application to the agent of an insurance company for a policy on the life of her husband, and paid fifty dollars in accordance with the company’s rules, which was to be applied to the first year’s premium provided the risk should be taken; and in due time a policy was made out and forwarded to the agent for delivery; but before it was delivered the husband died, whereupon the agent, though tendered the balance of the premium, refused to deliver it; *held*, that there

 Consummation of Contract. Contract.

was a valid contract for a policy ; that upon the taking of the risk the fifty dollars became the property of the company, and the assured became entitled to the policy ; and that such a contract was as available to sustain an action for the amount of the insurance as if the policy had been delivered. *Cooper v. The Pacific Mutual Life Insurance Company*, 656.

9. DELIVERY OF POLICY.— On September 1, 1870, plaintiff made a written application to defendant (through their agent in St. Paul, one Willius) for insurance upon the life of Freidolin Schwartz, her husband, and on the same day Willius forwarded the application to the home office in New York. September 9, Willius received a letter (dated September 5) from the home office acknowledging receipt of the application, and inclosing a policy (bearing date September 5) on the life aforesaid in the usual form of policies of endowment insurance. It provided for the payment of annual *premiums* of \$62.88 each, the first to be paid in hand, the rest respectively to be paid on or before the fifth day of September in every year during the continuance of the policy. Willius offered to deliver this policy to the husband Schwartz, upon payment of the premium. Schwartz declined to pay the same, and at his request the policy was, on October 13, returned to the home office with a request that it be changed for a policy providing for semi-annual instead of annual payments. October 25, Willius received a letter from the home office acknowledging the receipt of the returned policy and of his letter requesting the abovementioned change, and inclosing another policy like the first in all respects save that it provided for the payment of semi-annual premiums, \$32.07 in hand, and \$32.07 to be paid on or before the fifth day of March and September in every year during the continuance of the policy. October 13, Freidolin Schwartz was attacked with a dangerous illness of which he died October 29. October 25, after the arrival of the second policy, plaintiff went to the office of Willius, inquired for the policy and was informed that it had come. Upon asking if she could have it, she was told that she could not, because her "husband was taken sick." Thereupon, having requested that the premium money be taken, which was refused on the ground that "her husband was sick," she tendered the premium money, but defendant's agent refused to receive it for the sole reason that "her husband was sick." The second policy was never delivered or offered to be delivered, and about November 1, was returned to defendant's home office, at defendant's request. There was testimony in the case not contradicted, and tending to show that defendant's general instructions to Willius were to deliver policies on payment of the premium, provided the person whose life was to be insured was in health at the time of such delivery, but there was no evidence going to show that these instructions were known to plaintiff. *Held*, that no valid contract of insurance had been effected. *Schwartz v. The Germania Life Ins. Co.* 619.

CONTRACT.

See CONSUMMATION OF CONTRACT.

1. ACCEPTANCE OF POLICY. — An acceptance by a wife from her husband of a policy of insurance upon his life, procured by him for her benefit, without

Court and Jury. Debtor and Creditor.

previous authority from her, is a sufficient adoption of his act, and constitutes a valid contract between her and the company issuing the policy. *Thompson v. The American Tontine Life and Savings Insurance Co.* 693.

2. DISAFFIRMING CONTRACT. — A man who effects an insurance upon his life, through an agent of an insurance company, and accepts from the company a policy of insurance agreeing in all respects with the proposal signed by the insured, and transmitted by the agent to the company, and who retains possession of the policy, and pays a second premium thereon without objection, cannot afterwards be permitted to disaffirm the contract, and to recover back the premiums upon proof that the agent, at the time the proposals were made and the first premium paid, agreed, in consideration of the premium, to procure for him a policy of a different kind; and that the general agent of the company, when the policy was delivered and complaint made that it was not in proper form, promised that the company would make it all right. *Mecke v. The Life Insurance Company of New York*, 747.

COURT AND JURY.

See LAW AND FACT.

CREDIT.

See AGENCY.

CREDITOR AND DEBTOR.

See DEBTOR AND CREDITOR.

DAMAGES.

See RESTRICTIONS UPON RESIDENCE AND TRAVEL, 3.

DAYS OF GRACE.

See FORFEITURE, 3.

DEATH.

See AGENCY, 5.

DEBTOR AND CREDITOR.

See PREMIUM, 1; TITLE TO POLICY, 1.

1. INSURABLE INTEREST. TITLE TO POLICY. — A debtor and his wife joined in an assignment of the *chose in action* of the wife, to a creditor of the husband, to secure £300 owing by the husband. The creditor afterwards insured the life of the wife in a sum of £200. The *chose in action* was not reduced into possession in the lifetime of the wife. The wife died, and the creditor received from the insurance office the £200: *Held*, in a suit for redemption, that if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum assured towards the payment of his debt; that here the creditor had such insurable interest, but the risk ceased at the death of the wife; and that the money afterwards paid by the insurance office, being paid in their own wrong,

Debtor and Creditor.

- the debtor was not entitled to have it applied in reduction of his debt. *Henson v. Blackwell*, 50.
2. **POLICY EFFECTED BY CREDITOR. PAYMENT OF DEBT.** — A money lender agreed to advance a sum at 8 per cent. per annum, and the premiums on the insurance of the borrower's life. The borrower executed a bond with sureties, conditioned for payment of an annuity during his life equal to the above aggregate sums, and any increase in premiums by reason of the grantor being abroad; and the condition also provided for the cesser of the annuity on notice and payment of the original sum advanced, and all arrears of the annuity up to that time, but said nothing as to the policy: *Held*, that, on redemption, the borrower had no equity to have the policy delivered to him. *Gottlieb v. Cranch*, 86.
 3. **INSURANCE ON DEBTOR'S LIFE.** — One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money: *Held*, that, to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt. *Lea v. Hinton*, 92.
 4. **INSURANCE BY CREDITOR. ABANDONMENT.** — A debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life in the creditor's name, as a collateral security. The policy was effected, but after a time neither the debtor nor his surety paid the premiums on the policy, though required to do so by the creditor, who paid them himself: *Held*, on the death of the debtor, that he and his surety had not abandoned the policy, but that it was redeemable by the surety on repayment of the premiums paid by the debtor. *Drysdale v. Piggott*, 94.
 5. **POLICY EFFECTED BY CREDITOR. DEBT PAID. ANNUITY.** — Where the relation of debtor and creditor subsists, and a policy of assurance is effected by the creditor, directly or indirectly, at the expense of the debtor, under circumstances which show that it was intended as a security or indemnity to the creditor, he is bound, on payment of the debt, to deliver up the policy of assurance. *Courtenay v. Wright*, 98.
 6. The same principle applies to the case of a life annuity, and accordingly where the grantor came to redeem and repay the principal money, and have the judgment debt due to the grantee satisfied, and the securities delivered up, the grantee was decreed on payment to deliver up the policy of assurance. *Ib.*
 7. **REDEMPTION OF ANNUITY.** — The circumstances under which the grantor of an annuity is entitled on redemption to have a policy of assurance effected on his life by the grantee delivered up, considered. *Knox v. Turner*, 106. Reversed on appeal, 113, note.
 8. **INSURANCE ON DEBTOR'S LIFE.** — A tradesman insured the life of his debtor in his own name; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor, the court *held*, that his representatives were entitled to the produce of the policy after payment of the debt and premiums. *Morland v. Isaac*, 156.

Debtor and Creditor.

9. There is a distinction between a policy effected to secure a debt, and one to secure an annuity. *Ib.*
10. COMPOSITION WITH CREDITORS. BURDEN OF PROOF. — Composition arrangements with creditors form an exception to the rule, that an agreement to accept part of a debt in discharge of the whole is no legal satisfaction of the remainder. *Pfleger v. Browne*, 213.
11. If, upon a composition between a man and his creditors, one accepts the composition, and, in addition, agrees that the debtor shall keep up a policy on his life for the ultimate payment of the remainder of the debt, such an agreement is void, unless every creditor assents, and the policy belongs to the representatives of the debtor. *Ib.*
12. Where A pays the premiums upon a policy on his life, but the benefit of it is claimed by B, the onus of proof lies on the latter, even though the policy stands in his name. *Ib.*
13. INSURANCE BY CREDITOR ON DEBTOR'S LIFE. — An army agent, to whom an officer was largely indebted on the balance of account, effected in his own name policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shown to him, or that he knew that he was in the account charged with the premiums. *Held*, (reversing the decree of James, V. C.,) that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives. *Bruce v. Garden*, 255.
14. RIGHT IN SECURITY. INSOLVENCY. SALE OF POLICIES. — A debtor conveyed in security of a loan, certain policies of insurance which had been effected upon his life, binding himself at the same time to pay the annual premiums; the creditor on the other hand became bound, on the sums assured becoming payable, to apply them in extinction of his debt, and to account to the debtor for any balance that might remain over. The debtor became insolvent, and failed to pay the premiums which were advanced by the creditor to prevent the forfeiture of the policies; in these circumstances, it had been found by a judgment of the court, that the creditor was entitled to sell the policies, and to apply the proceeds in payment of the premiums advanced by him. *Held*, (in a subsequent action to that effect,) that he was also entitled to bring to sale the obligation of the debtor to pay the premiums. *Wood v. Anstruther*, 442.
15. TRUST. BANKRUPTCY. — A party who was creditor of an insolvent, and who also acted in the character of his trustee in winding up his affairs and obtaining a settlement for him with his other creditors, effected in his own name an insurance upon the insolvent's life for a period of seven years. *Held*, in the circumstances, that the insurance had not been effected by him in his character of trustee, but that it had been effected at his own risk and expense, without the knowledge or authority of the insolvent, and that therefore the executor of the insolvent was not entitled to claim the sum in the policy upon its emerging by his death. *Stevenson v. Cotton*, 463.
16. INSURANCE BY INSOLVENT DEBTOR. CREDITORS. — An insolvent debtor,

holding a life policy for \$10,000, payable to his representatives, procured it to be cancelled, and another policy issued in its stead, payable to his wife. *Held*, that if the premiums were paid out of his own means, the latter policy was void as to antecedent creditors. *Stokes v. Coffey*, 585.

17. An insolvent debtor insured his life for the benefit of his brother, to secure him for certain debts due him, and to indemnify him as surety for debts due others. *Held*, that the debts due the brother, and the debts for which he was surety, should be satisfied out of the proceeds of the policy, and that the balance should be treated as assets of the insolvent. *Held*, also, that the preference of the brother was not fraudulent. *Ib.*
18. WAGER POLICY. ASSIGNMENT. DIVISION OF FUND. — A owing B \$70, by B's advice takes out a policy of life insurance in \$3,000 for seven years, — he, B, agreeing to pay the premiums during the term. A dies intestate seven months after the policy is issued, leaving a wife and children. B, the creditor, produces A's note to him for \$3,000, dated on the same day with the policy, but given confessedly without consideration, and also an assignment of the policy to him. There is also found among A's, the debtor's, papers, one signed by B, the creditor, (but not by A,) dated three months after the policy had issued and been assigned, by which B, the creditor, agrees that in case of A's, his debtor's, death, and the payment to him, B, by the insurers, of the full amount of the policy, he will pay to the "wife of A, (the debtor,) his heirs and assigns," one third of the amount so received. B, the creditor, having received from the insurers the whole \$3,000, pays the wife, who has not yet taken letters of administration on her husband's estate, a third, less some small and admitted deductions; which third — ignorant of the full extent of her rights, acting hastily and without consideration, and largely influenced by the advice of one of her husband's friends, himself ignorant of many facts of the case — she received as for her proportion of the sum paid under the policy. She afterwards takes out administration on her husband's estate; and in her capacity of administratrix sues for the remainder of the \$3,000. *Held*, 1st, that so far as B was concerned, the policy being one of \$3,000 to secure \$70 was a sheer wagering policy; without any claim to be considered as one meant to secure the debt. 2d, that there was nothing beyond the execution of the note for \$3,000 to show that A was a participant in any fraud on the insurers, but on the contrary it rather appearing that he looked upon B as a friend to whom he was willing to trust the policy. *Held*, further, and as a consequence, that B was bound to account to A's estate for the whole sum, less any deductions for premiums or other just offset; and the assignment of the policy was valid only to that extent. 3d, that the third which the widow received, having been received by her when ignorant of the full extent of her rights, and received hastily, without consideration, and when influenced by the advice of a friend of her husband, while ignorant of many facts of the case, did not conclude her. Independently of this, that if she had a right as administratrix to recover the \$3,000, the receipt by her of \$1,000 before she took out administration could not defeat the right. *Cammack v. Lewis*, 826.

Declarations. Executor.

DECLARATIONS.

See AGE, 1; EVIDENCE; MISREPRESENTATION, 2.

DELIVERY OF POLICY.

See ASSIGNMENT, 5; CONSUMMATION OF CONTRACT; TITLE TO POLICY, 6.

DISORDER TENDING TO SHORTEN LIFE.

See CONCEALMENT, 3.

DROWNING.

See ACCIDENT INSURANCE, 2, 3, 8.

DRUNKENNESS.

See MISREPRESENTATION, 3.

ESTOPPEL.

See PERMITS, 1.

An insurance company having had the chance of a contract of life insurance turning out in their favor, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it. *Collett v. Morrison*, 71.

EVIDENCE.

See ACCIDENT INSURANCE, 7; AGENCY, 4; MISREPRESENTATION, 2; RESTRICTIONS UPON RESIDENCE AND TRAVEL, 2; WARRANTY, 5.

1. PAROL EVIDENCE. DECLARATIONS. — In a suit on a life insurance policy, parol declarations made by the agent of the company prior to the execution, delivery, and acceptance of the policy, cannot be received to vary or contradict the terms of the written contract, in the absence of any allegation and evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties. *Sullivan v. The Cotton States Life Insurance Company*, 543.

2. MEDICAL EXAMINER. FORMATION OF OPINION. — In an action on a life policy, the medical examiner of the company who had recommended the risk in 1867, having testified that in a conversation with the assured he had spoken of his great powers of endurance, and of his capability of performing considerable feats of pedestrianism, was asked: "If you had known that the assured had been so far weakened or prostrated by his pulpit services in the morning, in Philadelphia, (in 1860 or 1861,) that he was unable to attend in the afternoon, would that have influenced you in making up your opinion about recommending him, while he was informing you about his great powers of physical endurance?" *Held*, that the question was irrelevant, and therefore inadmissible. *Wise v. Mutual Ben. Life Ins. Co.* 595.

EXECUTOR.

See INSURABLE INTEREST, 1; POLICY, 2.

Family Physician. Health.

FAMILY PHYSICIAN.

See LAW AND FACT, 3.

The "family physician of the party" held to mean the physician who usually attends and is consulted by the members of a family in the capacity of physician. *Price v. Phoenix Mut. Life Ins. Co.* 626.

FIT.

See WARRANTY, 1.

FORFEITURE.

See ACTION, 4; PREMIUM.

1. POST-DATING A PERMIT, to avoid a forfeiture, is valid. *Walsh v. The Aetna Life Insurance Company*, 571.
2. WAIVER OF FORFEITURE may be effected by conduct of the company or its authorized agent inducing the policy holder to believe that the forfeiture will not be insisted upon; as by the subsequent receipt of premium, with knowledge of the breach of condition. *Ib.*
3. TIME OF FORFEITURE. DAYS OF GRACE.— One of the clauses in the policy of a life insurance issued by the Benevolent Aid and Life Insurance Company of Louisiana was, that the insured agreed to pay into the treasury of the association one dollar and twenty-five cents upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French, for five consecutive days. Held, that under this clause the assured was allowed the entire thirty days commencing and counting from and after the last of the five days of publication; and that the company could not claim the forfeiture of the policy on that account until thirty days after the last of the five days of publication had expired. *Wetmore v. Mutual Aid and Benevolent Life Insurance Association*, 592.

FRAUD.

See CONCEALMENT; MISREPRESENTATION; POLICY, 4; WARRANTY.

GUARDIAN.

See ACTION, 1.

HEALTH.

See CONCEALMENT, 7, 8.

WARRANTY.— The party whose life was proposed having signed a declaration that he was in perfect health, and the general state of his health was good; and the party proposing his life having made the truth of that declaration a fundamental condition of the policy: Held, that an express warranty was undertaken that the life was not more than usually hazardous. *Forbes v. Edinburgh Life Assur. Co.* 394.

 Incumbrance. Insurable Interest.

INCUMBRANCE.

PREMIUM.—The defendant agreed to assign a life policy to the plaintiff. When the policy was effected, it was agreed that the payment of one third of the annual premiums should be deferred until the death of the person insured, and be a charge on the policy. *Held*, that this was an incumbrance on the policy which the defendant was bound to discharge. *Gayles v. Flather*, 241.

INDEMNITY.

See **INSURABLE INTEREST**.

INSANE PERSON.

See **ACCIDENT INSURANCE**, 7.

INSANITY.

See **SUICIDE**.

INSURABLE INTEREST.

See **DEBTOR AND CREDITOR**, 1; **SUICIDE**, 2; **TITLE TO POLICY**, 4.

1. **AN EXECUTOR** in trust has a sufficient interest to enable him to make assurance in his own name on the life of a person who has granted an annuity to the testator. *Tidswell v. Ankerstein*, 1.
2. **WIFE'S INTEREST IN HUSBAND.**—A wife making an insurance on her husband's life need not prove that she was interested therein. *Reed v. Royal Exchange Assurance Company*, 2.
3. **FATHER'S INTEREST IN MINOR CHILD.**—The statute 14 Geo. 3, c. 48, by section 1 enacts, "that no insurance shall be made on lives, or any other event, wherein the person for whose benefit the policy shall be made shall have no interest, and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life, or other event." *Held*, that in order to render a policy valid within the meaning of this act, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; and that therefore a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was void. *Halford v. Kymer*, 4.
4. **POLICY FOR BENEFIT OF WIFE.**—From the case it appeared that M., before his marriage, had given a bond, conditioned to secure £5,000 to his wife; that, not being able to do so, an agreement was made among the family, by which, *inter alia*, M. was to insure his life for the benefit of his wife, she paying the premiums out of her own separate income; in pursuance of which he effected the policy and handed it over to K. for the benefit of the wife, intending to assign it regularly; that no assignment was executed; but the policy remained with K. as trustee for the wife, to M.'s death. These facts were communicated to the directors. *Held*, that this supported

 Insurable Interest.

- the issue on the part of the plaintiffs; that it was not necessary to show, by express evidence, that the proof of the interest had satisfied the directors, for that the court would infer from the facts that the directors were so satisfied, they not having discretion to reject reasonable proof; that the policy was not bad in law as offering an encouragement to suicide. *Moore v. Woolsey*, 138.
5. SEPARATE INTERESTS. — In an action on a policy of life insurance, effected by two persons, separate interests may be proved. *M'Cornick v. Ferrier*, 336.
 6. FRAUD. RETURN OF PREMIUMS. — The defendants, through R. their local agent, issued a policy of insurance for \$10,000 on the life of L., a brother of the plaintiff, for the benefit of and payable to the plaintiff. By a secret arrangement between R. and the plaintiff, R. advanced \$525 toward the payment of the premiums, and agreed to advance the subsequent premiums, the amounts so advanced to be refunded by the plaintiff; and it was further agreed that R. should assume the policy, if requested by the plaintiff, within three years, and refund to him the amount of premiums paid by him with interest, and should receive \$1,000 of the sum insured, if paid by the defendants, in case L. should die within three years. L. did not know of the existence of the policy, and was not examined by a physician as the rules of the defendants required, and the plaintiff had no interest in his life except such as arose from the relationship between them. The defendants were ignorant of all these facts. In the application for insurance, the plaintiff stated that he had an interest in the life of L. to the full amount of insurance applied for. The defendants having cancelled the policy, in an action to recover the amount of premiums paid, it was held: (1) That the transaction between the plaintiff and R. constituted a fraud upon the defendants, to which the plaintiff was a party in contemplation of law, and that the defendants could take advantage of the fraud as well against him as against R., although the plaintiff did not actually participate in the fraudulent intent. (2) That the mere relationship between the plaintiff and L. was not such an interest as would support the policy, but that the policy was *primâ facie* valid, and could only be avoided by showing by parol evidence such want of interest against the defendants. (3) That the responsibility assumed by the defendants, and the risk and inconvenience to which they were exposed by the acts of the plaintiff, constituted a consideration for the premiums paid. *Lewis v. The Phoenix Mutual Life Insurance Company*, 527.
 7. A REPUTED WIFE, treated and supported as wife, though not such in fact, held, to have an insurable interest in the life of her supposed husband. *Equitable Life Assurance Society v. Paterson*, 534.
 8. ASSIGNMENT. — The assignee of a life policy must have an insurable interest in the life as well as the insured (the assignor) himself. *The Franklin Life Insurance Co. v. Hazzard*, 559, and note, 564.
 9. POLICY OF INSURANCE BY HUSBAND FOR BENEFIT OF WIFE MADE PAYABLE TO SECOND WIFE. — At common law, and prior to the statute, (Wagn. Stat. 936, § 15,) the wife had such an interest in the life of her husband that a policy taken out by him for her benefit would be valid; and

 Intemperance. Law and Fact.

where the husband died during the life of his wife it would be enforced. But not as to her legal representatives where the husband survived her. The only ground upon which the policy could be sustained when issued was the fact that the wife had a right to look to her husband for support. That object being lost by her death, the husband would not be bound to continue the policy for the benefit of her legal representatives. And he might change the policy for the benefit of a subsequent wife. *Gamb v. Covenant Mutual Life Insurance Company*, 653, and note, 655.

INTEMPERANCE.

See VERDICT.

LATENT DISEASE.

See CONCEALMENT, 6.

LAW AND FACT.

1. MATERIALITY. — It is the duty of the judge at *nisi prius* to submit to the jury the question of the materiality of a fact withheld from the assurers. *Abbott v. Howard*, 294.
2. CONCEALMENT. — Assumpsit on three several policies of insurance on life; each of them contained a provision declaring that it should be void "if anything stated by the assured, either in the declaration or attestation therein before mentioned to have been made by him should not be true." The proposal for insurance contained the following particular: "Has the party's life been accepted or refused at any other office, and if accepted was it at the usual premium or with what addition?" The answer returned by the assured was, "Asylum and National Office, at the usual premium." The following agreement appeared at the foot of the proposal, and was signed by the assured: "I hereby agree that the proposal mentioned in the above policy shall form the basis of the contract, between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, all money which shall have been paid on account of this insurance shall become forfeited, and the policy void." The defendant proved at the trial that the assured had proposed the same party's life for insurance at two other offices, previous to effecting the insurance with the defendant's company, and that his proposal was rejected. The judge, in summing up, stated to the jury, that it was for them to say whether there had been a concealment by the assured of any circumstance which it was material for the company to know. *Held*, that this was a misdirection, for that the assured had contracted with the defendant's company that the several matters contained in the proposal should be answered truly, and consequently that the question, whether an answer given was more or less material, was not open to him. *Bennett v. Anderson*, 342.
3. USUAL MEDICAL ATTENDANT. — The question who was the usual medical attendant upon an applicant for life insurance is a question of fact for the jury, in an action on a life insurance policy. *Scoles v. Universal Life Ins. Co.* 783.

 Lien. Marriage Settlement.

LIEN.

See MARRIAGE SETTLEMENT.

MORTGAGED POLICY. — A policy of assurance was assigned by L. to S. as a security for a judgment debt due from L. to S., on which S. had created a charge in favor of V. The premiums were paid by S. during his life, and after his death by his administrator, at first on his own authority, and afterwards by the direction of the court in an administration suit. *Held*, that, as against V., the administrator of S. had a lien upon the money payable under the policy for the amount of the premiums paid by him, but not for the premiums paid by S. *Norris v. Caledonian Insurance Company*, 258.

LIFTING.

See ACCIDENT INSURANCE, 1.

· LOCAL DISEASE.

A TUBERCULAR AFFECTION OF THE LUNGS, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitute a local disease, as matter of law, within the meaning of the word "local," when used by a life insurance company to an applicant for insurance, by asking him if he has a local disease. *Scoles v. The Universal Life Insurance Company*, 783.

MARGINAL CLAUSE.

See POLICY, 6.

MARRIAGE SETTLEMENT.

1. **PAYMENT OF PREMIUMS BY WIFE. LIEN.** — By a settlement, executed upon the marriage of A with B, the daughter of W., trusts were declared of two several sums of £5,000, whereof one was secured by the bond of W., and the other by the covenant of A, and each was made payable to the trustees of the settlement within six months after the death of the settlor; and, as a further security for payment of the latter sum A assigned to the trustees certain policies of assurance which he had effected on his own life, to the value of the principal money comprised in his covenant. The trusts declared of the former sum were for B for life, for her separate use, and after her death for A for life, and after the death of both, and in default of children of the marriage, for the benefit of B's estate. The trusts of the latter sum were for B for life, and after her death, failing children of the marriage, for the executors, administrators, and assigns of A. After the marriage A became bankrupt, having up to that time paid the premiums on the policies of assurance. Under his bankruptcy the trustees proved for the value of his covenant, and invested the dividends received under that proof in the purchase of £431 consols. At the same time W. purchased of A's assignees all A's interest in the settlement, and took from them an assignment of that interest. A afterwards died; whereupon the trustees received the produce of the policies, and invested it in £5,992 consols. Ultimately W. became bankrupt, and died: *Held*, that notwithstanding that the interest of W. in the trust funds did not arise from the settlement, but by purchase and as-

Marriage Settlement. Military Service.

- signment from A's assignees, the assignees of W. could take no interest in the £5,992 stock, without first satisfying the trustees of the settlement what was due to them in respect of W.'s bond for £5,000; and *quære*, whether, notwithstanding the assignment to W. of A's interest under the settlement, A's assignees had not a right to recall the dividend which produced the £431 consols? *Burridge v. Row*, 28.
2. FEME COVERT, out of her separate income, pays the premiums on certain policies of assurance, which, by a settlement made previously to her marriage, were assigned as collateral security for a provision settled upon her under that instrument by the covenant of her husband. *Held*, that upon the money secured by the policies becoming payable, she was entitled to a lien on the policy fund for the amount of the premiums so paid. *Ib*.
3. MARRIAGE SETTLEMENT. BONUSES. — Upon the construction of a settlement, it was *held*, that a policy effected in the names of trustees was itself settled; but that, under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. Bonuses having been declared, the husband continued to pay the full premiums, and it was *held*, on his death, that the bonuses were accretions to the trust, and did not belong to his executors. *Gilly v. Burley*, 167.

MATERIAL FACTS.

See CONCEALMENT; LAW AND FACT; MISREPRESENTATION; WARRANTY.

MEDICAL ATTENDANT.

See FAMILY PHYSICIAN; LAW AND FACT, 3.

MEDICAL EXAMINER.

See EVIDENCE, 2.

MILITARY SERVICE.

1. CHAPLAIN. — The insured was asked if he had been employed in any military or naval service; to which he replied in the negative. There was some evidence that he had been a chaplain in the Confederate army. The court below was asked to instruct the jury that if the insured had been a chaplain in the Confederate army this question had been improperly answered, and that there could be no recovery; but that court refused to do so. Judgment affirmed on appeal. *Wise v. Mutual Ben. Life Ins. Co.* 595.
2. CONSTRUCTING BRIDGE. — A provision in a policy of life insurance, forfeiting the policy in case the assured shall enter into any military or naval service without the consent of the company, includes only such service as will require the person entering into it to do duty as a combatant. An employment therefore, by military authorities, in constructing a railroad bridge, is not within the prohibition of the policy, and does not invalidate it. *Wells v. The Connecticut Mutual Life Insurance Company*, 681.

MISREPRESENTATION.

See AGE, 3; CONCEALMENT; LAW AND FACT, 2.

1. **HEALTH. UNTRUE STATEMENT.** — By a declaration and statement as to health, &c., signed by the assured, previous to effecting a policy on a life, it was agreed, that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and the assurance be absolutely null and void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it. *Held*, that the premiums were forfeited, and could not be recovered back. *Duckett v. Williams*, 8.
2. **DECLARATIONS AS TO HEALTH. REASSURANCE.** — The M. Insurance Company executed a deed-poll, which was a life policy for one year, on the life of O. It was in the ordinary printed form of such policies, and commenced with the recital that the assured had on 21st November last caused to be delivered into the office of the M. a declaration in writing, signed by them, touching the age, past and present health, and other circumstances relating to O., which the assured had agreed should be the basis of the contract. And there was the usual proviso that if anything in the declaration was untrue, the policy should be void. In an action on this policy, the M. pleaded that the declaration was untrue. On the trial, it appeared that the policy was one of reinsurance by the B. Company, who had several years before insured O.'s life for a larger sum. On the negotiation for the reinsurance, all the papers relating to the original insurance were shown to the M. The M. sent to the B. one of their printed forms for a proposal for insurance, adapted to the case of an original insurance, having many printed questions relating to the health of the party, with blanks for the answers, and below, a printed declaration by the person whose life was to be insured that the above statement was true, and an agreement on the part of the persons who were to be assured that the declaration should be the basis of the contract, and that if anything therein contained was untrue, the policy should be void; with blanks at the bottom of the declaration for the signatures of the person whose life was to be insured, and of those in whose favor the insurance was to be made. The M. had bracketed together, in ink, the questions relating to the health of O., and written, "For these particulars, see B. papers attached." The manager of the B. signed under this his name, and returned the paper, with the blanks for the signature of the declaration not filled up. The B. papers were those relating to the original insurance, and contained a declaration by O. as to his then state of health. It was now admitted that this declaration was then true, but that the state of O.'s health had, without the knowledge of either the M. or the B., changed, and the declaration referred to the state of health at the time the paper was sent to the M. would no longer be true. After this paper had been sent in, the policy was executed, and sent to the B., who received and kept it without observation on the form of the recital. Some evidence was, without objection, given of a custom in reassurances to confine the declaration to the state of health at the time of the original insurance. The learned judge left it the jury to consider all

Misrepresentation.

the circumstances, and say whether it was intended by both parties that the paper should be understood as a declaration as to O.'s present health. The jury found for the plaintiff. On a motion for a new trial the court were equally divided: ERLE and WIGHTMAN, JJ., for a new trial; COLERIDGE, J., and CAMPBELL, C. J., *contra*. The rule dropped. *Foster v. The Mentor Life Assurance Company*, 113.

3. **UNTRUE BUT BONA FIDE ANSWERS. DRUNKENNESS. MEDICAL ATTENDANT.** — An action on a life policy was based upon answers by the assured to certain questions (*inter alia*): "If of sober and temperate habits?" "If aware of any disorder or circumstance tending to shorten life?" &c. "Is there any other and what information touching the past or present state of health which the company ought to be made acquainted with?" "Name and address of ordinary medical attendant." It appearing that the assured had in the year preceding that in which the policy was effected, and in the very same year, been attended for the effects of severe drinking, on the last occasion (a month or two before the policy) for *delirium tremens*, of which he in two years' time died, and that the medical man who had attended him for several years before the policy, and down to his death, was not mentioned as the ordinary medical attendant: *Held*, that this justified a verdict for the defendants, even though the answer to the latter question was *bonâ fide*. *Hutton v. The Waterloo Life Assurance Company*, 199.
4. **"UNTRUE STATEMENT."** — If a policy of insurance be granted on the life of A, subject to the condition, that if any fraudulent or untrue statement be contained in any of the documents addressed, &c., to the insurers in relation to the insurance by A, then the policy to be void; and A gives, in one of the documents required by the insurers, written answers to questions respecting his bodily health, amounting to a negation of his ever having had any serious disorder requiring confinement, except one particularized as being of a week's duration, &c., when, in fact, he had had, subsequently to this, another attack of illness, under which his life was in danger, &c.; he makes an untrue statement within the meaning of the condition, and so avoids the policy, although the jury find that there was no intention to deceive, and no material information withheld. *Cazenove v. The British Equitable Insurance Company*, 202.
5. **REINSURANCE.** — Insurance Company A., (having previously granted a policy of reinsurance to Insurance Company B. on the life of L. T. for £3,000,) on the 10th of May, 1861, offered to Insurance Company C. £1,000 of the risk, stating that Insurance Company D. had agreed to undertake £1,000, and that they (Company A.) would retain £1,000. Company C. accepted the proposal, without the usual investigation or inquiries into the age, health, or habits of the insured as a partnership risk. The policy granted by Company C. was dated, and the premium was paid, on the 18th May, 1861. Company A., on the 15th May, 1861, came to a resolution not to, and they did not, in fact, retain any portion of the risk; but this resolution, and the course of action upon it, was not communicated to Company C. In 1862 the insured died of heart disease. *Held*, that the policy granted by Company C. was void, and must be delivered up to be cancelled. *Trail v. Baring*, 233.
6. **REPUTED WIFE.** — Where one as the agent of his reputed wife represented

Mistake.

to an insurance company that she was his wife, and effected an insurance upon his own life in her name, as her agent, and for her benefit, and the truth was that the marriage was void by reason of the reputed wife having a lawful husband living at the time of the second marriage: *Held*, that the policy was not void by reason of the illegality of the last marriage, unless it farther appeared that at the time the policy was effected the said reputed husband and wife knew that at the time of their alleged marriage the lawful husband of the wife was living, and failed to inform the company of the fact. *The Equitable Life Assurance Society v. Paterson*, 534.

MISTAKE.

See POLICY, 1; SUICIDE, 6.

1. REFORM OF POLICY. — An erroneous statement was made to a life insurance company, by or through their agent, as to A's interest in his son's life, upon which the company granted a policy to A. After the son's death, the company discovered the error and refused to pay the sum insured. A bill filed by A to have the mistake rectified was dismissed, because the evidence did not show distinctly whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A. *Parsons v. Bignold*, 39.
2. PROPOSAL FOR INSURANCE, MISTAKE IN. PRINCIPAL AND AGENT. POLICY VOID AB INITIO. PREMIUMS ORDERED TO BE REPAID BY SOCIETY. — By a verbal agreement, entered into in 1851, between the plaintiff K., and W. C., the agent in London of the S. E. Insurance Society, it was agreed that a policy should be granted to the plaintiffs R. and K. on the life of H., a merchant residing at Gibraltar, and that the policy should not be vitiated by reason of H. visiting, among other places, ports on the coast of Africa; and a proposal for the policy was drawn up by the plaintiff R., at the office of the society in London, and forwarded by the agent, W. C., to the chief office of the society in Edinburgh. In that proposal it was stated that the policy could not be accepted except on the condition that H. should be at liberty "to visit Tangiers, or any other port within the Mediterranean," without subjecting himself to any extra premium; but it was understood that he was not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia or Africa. The policy was effected, with a memorandum indorsed upon it in the terms of the above condition, and the plaintiff paid several premiums. H. went to a port on the Atlantic coast of Africa, and died there of apoplexy, within a short period — less than three months after his arrival. The S. E. Insurance Society refused to pay the insurance money, and thereupon an action was brought in the court of exchequer to recover the amount. The defence to the action by the society was, that the policy had become void by reason of H. having died at a port not within the terms of the agreement. On bill filed by the plaintiffs to have the mistake made in the indorsement on the policy rectified, the court *held*, that W. C., the agent in London, had no power to bind the society, and as the memorandum had been framed under a mistake, the real terms of the agreement never having been communicated

Mortgage of Policy. Payment of Premium.

to or adopted by the society, the policy was not binding upon either party; and the court ordered that the society should repay to the plaintiffs the premiums, and that the plaintiffs should thereupon deliver up the policy to the society. *Fowler v. The Scottish Equitable Life Insurance Society*, 173.

3. MISTAKE CONCERNING DEATH. PAYMENT. EFFECT ON POLICY. — The holder of a policy of life insurance, having produced evidence to show that the person insured had died in Australia, received the amount of the policy from the insurance company. It was afterwards ascertained that the insured was still alive. The company demanded repetition of the sum paid, and refused to revive the policy, on the ground that they had been induced to pay by misrepresentations and undue concealment of facts within the holder's knowledge. In an action of repetition raised by the company, and a counter action of declarator, &c., raised by the policy holder, *held*, (after proof which established that the holder had acted *bonâ fide*,) that the policy was a subsisting policy, which the company was bound to redeliver on payment of the sums received and interest, and the premium which had fallen due. *The North British and Mercantile Insurance Company v. Stewart*, 510.

MORTGAGE OF POLICY.

See LIEN; SUICIDE, 5.

MUTUAL COMPANIES.

See WAR, 8.

NOTICE. — The fact that a person is a member of a mutual insurance company does not fix upon him notice of all the regulations of the company in transacting business. *Walsh v. Ætna Life Ins. Co.* 571.

NEGLIGENCE.

See ACCIDENT INSURANCE, 10.

NON-FORFEITURE ACT.

See ACTION, 4.

NOTICE.

See MUTUAL COMPANIES; RESTRICTIONS UPON RESIDENCE AND TRAVEL.

OCCUPATION.

See ACCIDENT INSURANCE, 14.

OPIUM.

See WAIVER.

PARTNERSHIP.

See AGENCY, 5.

PAYMENT OF PREMIUM.

See AGENCY; BANKRUPTCY; MISTAKE, 3; PREMIUM; WAR.

 Permits. Policy.

PERMITS.

See FORFEITURE, 1; RESTRICTIONS UPON RESIDENCE AND TRAVEL.

PERSONAL INJURY.

The assured in a life policy, in reply to the question, "Had she ever had a serious personal injury," answered "No." She had, ten years before, fallen from a tree. The criteria of a serious personal injury considered. *Insurance Company v. Wilkinson*, 810. *

POLICY.

1. REFORM OF POLICY. — If upon a proposal and agreement for a life insurance, a policy be drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement, and not on that of the policy. *Collett v. Morrison*, 71.
2. INSURANCE BY EXECUTOR. POLICY DROPPED BY HIM. — An executor, without a special authority, applied the testator's assets for several years in insuring the life of a debtor to the estate. He then dropped the policy without consulting the parties beneficially interested, and without applying for the direction of the court in a suit for administration of the estate then pending : *Held*, that he was liable for the whole sum which would have been recovered if he had kept up the policy. *Garner v. Moore*, 140.
3. IN ESTIMATING THE VALUE OF A CURRENT POLICY in a life assurance company in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the same premium in a solvent office. *In re English Assurance Company: Holdich's case*, 272.
4. SURRENDER AND REISSUE OF POLICY PAYABLE TO A THIRD PERSON. — Upon the application of A a policy of insurance upon his life was issued by a life insurance company, for his own benefit. A afterwards surrendered this policy to the company, and at his request a second policy was issued in lieu thereof, similar in all respects to the first, except that it was payable to B, to whom A was engaged to be married. The second policy was by direction of A placed in the hands of C as a depositary for B. A afterwards, without the knowledge or consent of B, obtained possession of the second policy, and surrendered it to the company, who cancelled it and issued in lieu thereof a third policy, similar to the others, except that it was payable to D, to whom A was indebted, and intended it as security for such indebtedness. D paid one premium upon the third policy. At the time the second and third policies were issued, A's health was such that he was unable to pass the required medical examination for a new policy. In a bill in equity by B against the company and D, who resided beyond the jurisdiction of the court, and although notified of the pendency of the suit did not appear, praying that the company might be ordered to pay the avails of the third policy to her, and enjoined against paying them to D, it was *held*, that there was an executed gift of the second policy to B; that the consideration for the third policy was the surrender of the second,

Policy.

and that therefore B was equitably entitled to the benefit of the third policy, and was entitled to a decree ordering the avails of it paid to her, less the amount of the premium paid by D. *Lemon v. The Phoenix Mutual Life Insurance Company*, 521.

5. **REVOCATION OF POLICY. CONSIDERATION.** — Where a policy of insurance upon the life of one is made payable to and held by another, but is so held in whole or in part for the benefit of the insured, or of whomsoever he shall designate, the insured has the power to revoke *pro tanto* the authority of the holder, or to change the conditions of the holding, and to annex to it new conditions. And if the insured suffers it to remain in the possession of the holder, upon his promising to pay a debt of the insured out of the avails of the policy when collected, this is a valid consideration for the promise; and the creditor for whose benefit it was made, although having no knowledge of it at the time, can affirm and enforce it. And if the insured made the request to and laid the duty upon the holder, and he, though making no direct promise, did not decline, or offer to give up the policy or the interest of the insured therein, but retains it and receives the whole amount, his consent is to be presumed. *Hutchings v. Miner*, 696.
6. **MARGINAL CLAUSE.** — An entry upon the margin of the policy issued as a "paid up policy," in exchange for an endowment policy, upon which two annual premiums had been paid, partly by two notes, was as follows: "This policy is conditional on the interest on the two notes given in part payment for two premiums paid on No. 10,603 being paid in advance;" held to be a part of the policy, the same as though inserted in the body of the instrument. *Patch v. The Phoenix Mutual Life Insurance Company*, 777.
7. **PREMIUM NOTES.** — The notes provided that the interest thereon should be paid in advance, and it was held that the effect of the marginal clause was to make the policy conditional upon the payment of the interest annually in advance; that the terms of the condition were not complied with by payment of the interest in advance the first year only. *Ib.*
8. **THE INTEREST UPON THE NOTES** became practically a premium upon the policy, payable annually in advance, and on failure to pay the same, the company ceased to be liable, and the policy was forfeited. *Ib.*
9. **SURRENDER OF POLICY AND RENEWAL BY AGENT. VIOLATION OF INSTRUCTIONS.** — D., plaintiff's intestate, having a policy of insurance upon his life, had agreed with the company for the surrender thereof, and a return to him of his premium notes held by the company, which notes had accordingly been sent to the company's agent, to be delivered up. D. intrusted the policy to defendant as his agent, with instructions to surrender the same for cancellation. Defendant surrendered the policy, but before the notes had been cancelled or surrendered applied to have the policy renewed for the benefit of himself and G. D. D. The agent thereupon returned the notes to the company, with a statement that D. wished to renew, and that defendant and G. D. D. were to help him. A renewal policy was thereupon issued for the benefit of defendant and G. D. D. The premiums were thereafter paid by defendant and G. D. D., as were also D.'s premium notes, less the amount of dividends credited thereon. G. D. D. assigned his interest to defendant, and upon the death of D. defendant collected and

 Post Mortem Examination. Premium.

received the amount of the policy. In an action to compel the defendant to account, *held*, (GROVER, J., dissenting,) that by accepting the renewal policy defendant must be deemed to have adopted the instrumentalities by which it was obtained, and was bound by the representation of the agent to the company; that, aside from this, defendant, while acting as agent, having acquired, by departing from his instructions, a benefit, a part of the consideration for which proceeded from his principal, plaintiff had the right to adopt his acts and to call him to account for the profits derived from the transaction. *Dutton v. Willner*, 738.

10. IT SEEMS, however, that if defendant had asked and obtained the consent of his principal, in the absence of concealment or fraud, defendant might have been discharged from his obligations as agent, and might have acquired a beneficial interest in the policy. *Ib.*

POST MORTEM EXAMINATION.

See CONCEALMENT, 5.

PRELIMINARY PROOFS.

See ACCIDENT INSURANCE, 11.

1. SUFFICIENCY OF. — The fact that preliminary proofs have been delivered is some evidence of the performance of the provision requiring them; and these proofs being in possession of the defendants, and not having been accounted for or produced by them, and the company having received the proofs without objection, it will not be assumed that they were defective. *Hincken v. The Mutual Benefit Life Insurance Co.* 711.
2. Certain evidence that due notice and proof of death had been given, *held* sufficient. Such evidence, in the case of a policy payable a certain time after due notice and proof of death, is material only for the purpose of showing that the time of payment had elapsed; the policy not making them a condition precedent. *Ib.*
3. No objection having been made to the preliminary proofs of loss, and the same, though in the possession of the company, not being produced, *held*, evidence that no valid objection to them existed. *Ib.* 734.

PREMIUM.

See ASSIGNMENT, 6; BANKRUPTCY; INCUMBRANCE; INSURABLE INTEREST, 6; WAR.

1. INSURANCE ON LIFE OF DEBTOR. — B. and S. having been directed by defendant to effect an insurance on his life in his own name or in the names of B. and S., to whom he was indebted, effected an insurance in the names of B. and S., and a third person whom they had taken into partnership. *Held*, that they had no authority for effecting the insurance in the three names; and defendant having never acknowledged the transaction, that they could not recover from him the amount of premiums paid on the policy. *Barron v. Fitzgerald*, 12.
2. THE VOLUNTARY PAYMENT of premiums on a policy of assurance confers on the payer no interest in the policy. *Burridge v. Row*, 28.

Premium.

3. ANNUITY. INSURANCE BY GRANTEE TO SECURE.—An insurance company purchased an annuity and took as a security an assignment of the whole equitable interest of the grantor in a trust fund, which produced much more than enough to pay the annuity; with a proviso that in case the company should insure any sum not exceeding the price of the annuity, and should pay an additional rate of insurance, by reason of the grantor going beyond sea, all sums so paid for additional premiums should be retained out of the life interest, and the surplus be held in trust for the grantee. No policy of assurance was, in fact, effected, except that the company became their own insurers by making a policy in a separate branch of their own company. *Held*, that though the grantor did, in fact, go beyond sea for several years, the company were not entitled to charge the premiums for the extra risk which had been incurred, no additional premiums having been in fact paid. *Grey v. Ellison*, 160.
4. RESTITUTION OF PREMIUM refused, although the policy was null for want of interest, in terms of 14th Geo. 3, c. 48. *Campbell v. Allan*, 392. *Infra*, 6.
5. A REVERSION COMPANY made an advance to a party on condition, *inter alia*, that he should open a policy on his life, and for payment of the annual premiums to accrue thereon, he and another, as cautioner, granted their joint obligation; these parties having failed to make payment of the premiums, the directors of the company opened a policy in their own names on the principal party's life. *Held*, in an action to that effect, that the reversion company were entitled to payment by the said two parties of the premiums on the policy so opened by them, as indemnification for the failure to implement the obligation entered into. *Gibson-Craig v. M'Alpine*, 440.
6. POLICY VOID FOR WANT OF INTEREST. RECOVERY OF PREMIUMS.—A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children. *Held*, that such policy was illegal, under 14 Geo. 3, ch. 48, sec. 2, for the name of the person interested therein, or on whose account it was made, was not inserted in it *as such*; and the declaration of trust, which showed that the plaintiffs had no interest, could not be incorporated as part of the policy. *Held*, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a *delictum* on their part, so as to make the maxim "*in pari delicto*," &c., applicable; but that they could recover only the first premium paid, the other payments not appearing upon the evidence to be made by them and their own money. *Held*, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as the basis of the contract. *Dowker v. The Canada Life Assurance Company*, 515.
7. LOAN. ADVANCE.—C. F. T., general agent of defendant, appointed D. W. T. and his partner sub-agents, and on the same day received the application of D. W. T. for a policy which was forwarded to defendant. At the same time, C. F. T. asked the sub-agents for a loan or advance, stating he

 Premium Notes. Representation.

needed it on his journey, and that they should charge it to the company on premiums to be collected thereafter. D. W. T. thereupon made the required advance. Afterwards, the policy was received by D. W. T. by mail. *Held*, that the transaction was not a loan to C. F. T. upon his individual credit, but an advance by the sub-agent to the general agent on account of premiums expected to be collected, including the premium on the policy in question, and was in effect a payment in advance of that premium, subject to the condition of the acceptance of the risk. *Thompson v. American Life Ins. Co.* 693.

PREMIUM NOTES.

See POLICY, 7, 8.

PRINCIPAL AND AGENT.

See AGENCY.

PROPOSAL.

See CONCEALMENT, 6 ; MISTAKE, 2.

DECLINING A PROPOSAL. — The insured in this case was asked if any company had declined to insure his life, to which he answered No. There was evidence that previously the deceased had been examined for insurance in another company, and that the physician had reported him in good health, but that his weight was below the standard ; that an application had been made and sent on without the knowledge of the deceased, and directions given by the company's home agent that it be withdrawn ; the sole reason assigned for not passing upon it being that the deceased was under weight. *Held*, in the court below, that a prayer that the court should instruct the jury as matter of law upon these facts, that there had been a declining to insure the deceased, must be refused. Judgment affirmed on appeal. *Wise v. Mutual Ben. Life Ins. Co.* 595.

REASSURANCE.

See MISREPRESENTATION, 2, 5.

REBELLION.

See WAR.

REFEREES.

The answers of persons to whom an insurance company may be referred for information are binding only so far as it was agreed that they should be questioned. *Rose v. Star Insurance Co.* 346.

REFORM OF POLICY.

See MISTAKE ; POLICY, 1.

REINSURANCE.

See MISREPRESENTATION, 2, 5.

REPRESENTATION.

See CONCEALMENT ; MISREPRESENTATION ; WARRANTY.

RESTRICTIONS UPON RESIDENCE AND TRAVEL.

See FORFEITURE, 1 ; PERMITS.

1. **BREACH OF COVENANT AS TO TRAVEL. NOTICE.** — The declaration stated that, by indenture, the defendant covenanted that he would, at any time or times thereafter, appear at an office or offices for the insurance of lives within London, or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do or permit to be done any act whereby such insurance should be avoided or prejudiced. It then alleged that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him ; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso, that if the defendant went beyond the limits of Europe, the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America. *Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected. *Vyse v. Wakefield*, 17.
2. **PAROL EVIDENCE.** — To a declaration on a policy of insurance on the life of H., conditioned that if H. went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that H. should be at liberty to visit Tangiers, or any other port within the Mediterranean ; the defendants pleaded that H. departed beyond the limits of Europe otherwise than by visiting Tangiers or any other port within the Mediterranean. The court refused to allow the plaintiffs to plead as a replication on equitable grounds, that at the time of the making of the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports and places out of Europe ; and that the plaintiffs entered into the policy on the terms of such stipulation. *Reis v. The Scottish Equitable Life Assurance Society*, 171.
3. **DAMAGES.** — A deed by which the defendant assigned a policy of insurance on his life for £1,000 to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited. The policy was subject to a condition that if the assured should go beyond the limits of Europe without license from the directors the contract should be void. In an action for a breach of covenant, in that the defendant went beyond the limits of Europe without license from the directors, *held*, that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the defendant covenanted to pay and should pay premiums on the policy. *Hawkins v. Coulthurst*, 230.
4. **AGENCY. ESTOPPEL.** — The power of a special agent to grant travelling permits, and to receive and receipt for money paid thereon, considered. A company *held* estopped by the conduct of their agent to deny the effect of a permit given by him without authority. *Walsh v. Aetna Life Ins. Co.* 571.

 Revocation. Suicide.

5. **WAR OR REBELLION.** — At the time of issuing the policy in question, defendant, for a further premium of fifty dollars, by a written instrument gave the assured permission to go south of the thirty-sixth degree of north latitude and reside there during the term of one year; provided, and with the understanding and agreement, that the policy did not insure against death from any of the casualties or consequences of war or rebellion, or from belligerent forces. While engaged in building a railroad bridge, under the direction of the military authorities of the United States, about thirty miles in the rear of the Union army, and still further from the Confederate forces, the assured was shot and killed by two of a party of men not in uniform, who robbed the men employed upon the work and residents near. *Held*, that the language of the proviso included only death from casualties or consequences of war or rebellion carried on or waged by authority of some *de facto* government; that this case did not come within that limit; and that defendant was liable. *Welts v. Connecticut Life Insurance Co.* 681.

REVOCATION.

See **POLICY**, 5.

STATUTE OF LIMITATIONS.

- LAPSE. NON-PAYMENT OF PREMIUM.** — To an action brought to recover the amount of a policy of insurance, the company having pleaded the statute of limitations, the plaintiff replied on equitable grounds that before the six years had elapsed, one J. B., who claimed an equitable lien on the policy, filed a cause in the court of chancery to enforce payment of it; that at the hearing before the master of the rolls, the defendants insisted that the policy had lapsed by reason of the non-payment of the premiums, and was not then subsisting; and that the master of the rolls had accordingly directed the present action to be brought to try that question, and had in the mean time retained the petition. *Held*, that the above was an equitable answer to the plea. *Supple v. Cann*, 382.

STRAIN.

See **ACCIDENT INSURANCE**, 12.

SUICIDE.

See **ACCIDENT INSURANCE**, 9.

- 1. COVENANT TO KEEP POLICY IN FORCE.** — A party covenanted to perform all matters requisite for keeping a life policy on foot. *Held*, that this covenant could not be read negatively, as if he had covenanted to do no act whereby the policy would be avoided, and therefore that the covenant was not broken by the suicide of the covenantor — a thing whereby the insurance was forfeited. *Dormay v. Borradaile*, 57.
- 2. INTEREST.** — Declaration, by the executor of M. against the directors of a life assurance company, alleged that M. insured his life for £999, by a policy containing conditions: viz. (8.) "Policies effected by persons on their own lives, who shall die by duelling or by their own hands, or by the hands of

Suicide.

justice, will become void so far as regards the executors or administrators of the person so dying, but will remain in force only to the extent of any *bonâ fide* interest which may have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction;” (9.) “If a person who shall have been assured upon his own life for at least five years, or shall have paid a sum equivalent to at least five years’ annual premiums, shall die by his own hands, the directors shall be at liberty, if they think proper so to do, but not otherwise, to pay, for the benefit of his family, any sum not exceeding what the company would have paid for the purchase of his interest in the policy, if it had been surrendered on the day previous to his decease; provided the interest in such assurance shall be in the assured, or in a trustee for him, or for his wife or children, at the time of his decease.” The declaration then averred M.’s death, and that defendants had not paid. Plea: that M. died by his own hands. Replication: that before M.’s death, K. acquired a *bonâ fide* interest in the policy by actual assignment by way of security for money, within the meaning of the conditions; and proof of the extent of such interest was, before action, given to the directors of the company to their satisfaction. Held bad, on demurrer, for not showing an assignment by deed. Further replication: that, before the death of M., K. acquired a *bonâ fide* interest in the policy by virtue of an equitable lien as a security for money; and proof of the extent of such interest was, before action, given to the directors to their satisfaction. Issue being taken on this replication, the facts were stated in a case giving to the court the same power to draw inference of fact as a jury. *Moore v. Woolsey*, 138.

3. ASSIGNMENT. — One of the conditions of a life policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties for valuable consideration, six months before his death. Held, that a letter to A B charging it with a floating balance due to him, and made three years previous to the death of the assured by his own hand, was within the exception. *Jones v. The Consolidated Investment Assurance Company*, 192.
4. BURDEN OF PROOF. SCINTILLA OF EVIDENCE. — In an action on a life policy, to be cancelled in case of suicide by return of premiums: Plea, that the deceased died by suicide, and that the premiums were ready to be returned. The defendant held entitled to begin, the *onus* being upon them of proving that the death was by suicide, and they having put in the deposition of the widow and executrix, given upon the coroner’s inquest, to the effect, that the day before his death the deceased had unaccountably gone out of his bedroom very early in the morning, and immediately afterwards had been found falling over the banisters; that later in the day, after he had complained of giddiness and pains in the head, he had been found suddenly falling out of a window, his wife being in the room at the time, and not being able to say how he came to fall out. Held, that there was a *scintilla* of evidence to support the plea; that the question upon it was, not merely whether the deceased threw himself out of the window, but whether, if so, he did it

Suicide. Title to Policy.

voluntarily, and not through confusion of his senses. *Stormont v. The Waterloo Life and Casualty Assurance Co.* 196.

5. MORTGAGE OF POLICY. — An assurance company advanced money to W. on a mortgage of real security, and on his effecting a policy on his life in their office for the amount of the loan, which was deposited with the company as collateral security. The policy contained a condition that if the assured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any *bonâ fide* interest therein which at the time of such death should be vested in any other person or persons for a sufficient pecuniary or other consideration. W. committed suicide under temporary insanity while the policy was in the hands of the company. *Held*, that the company and the assured stood in the same position as if the policy had been mortgaged to any third person; that the company came within the exception in the condition; and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured. *White v. British Empire Mutual Life Assurance Company*, 251.
6. MISTAKE. — In the policy in question, there was a provision that the company should not be liable if the assured should die by his own hand. *Held*, that if the assured drank to intoxication, and, while in this condition, by accident or mistake, took an over-dose of laudanum and died therefrom, this was not a dying by his own hand in the sense of the policy, even though the mistake or accident were in some sense occasioned by the drunkenness. But if the deceased took the laudanum with intent to destroy his life, it was immaterial that he was drunk at the time, and the policy was avoided. *Equitable Life Assur. Society v. Paterson*, 534.
7. INSANITY. — In an action on a policy of life insurance containing a provision that if the insured "should die by his own hand" the contract should be void; *held*, that mere proof that the insured, who had committed suicide, was insane at the time, was insufficient to take the case out of the provision mentioned. The insanity must be of such a character as to render the insured wholly unconscious of the act. The evidence of insanity in this case examined. *Fowler v. The Mutual Life Insurance Company*, 673.
8. In an action upon a policy of life assurance containing a condition that if the assured shall "die by his own hand," the policy shall be void; if the death be caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable. *Life Insurance Company v. Terry*, 819.

TITLE TO POLICY.

See DEBTOR AND CREDITOR.

1. INSURANCE ON DEBTOR'S LIFE. — Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premiums to the account of the debtor, who pays

Title to Policy.

- them, if the principal is afterwards paid, the debtor or his representative is entitled to the policy. *Holland v. Smith*, 2.
2. **FRAUD.** — In detinue by the executor of N. against M., a banker, for a policy of insurance on the life of S., M. pleaded that the policy was not the property of N., and also that N. had *fraudulently* permitted S. to hold the policy and represent that he was entitled to the money secured by it, and that he did so represent to M., who lent him money on it. Replication, denying the fraudulent permission. S. had insured his own life in 1831, and by deed assigned the policy to N. in 1832, who gave notice of the assignment to the office, and paid all the premiums afterward. S. retained the policy till he deposited it with M. on a loan of money in 1843. *Held*, first, that the property in the policy passed to N. by the deed of 1831, although he had no possession of the policy; and secondly, that though N. had been guilty of negligence in allowing S. to retain the policy, the defendant had not proved his special plea, unless the jury were satisfied that N. intended that S. should borrow money of some one, and left the policy in S.'s hands in order that he might cheat some one by borrowing money on it; and the judge would not ask the jury what they would have found if the word "fraudulently" had not been inserted in the plea. *Neal v. Molineux*, 62.
 3. **PREMIUM.** — Where A effects a policy in his own name upon the life of B, declaring he is interested in B's life, such policy, *prima facie*, belongs to A, and the mere proof that some of the premiums were paid by B does not rebut that presumption. *Triston v. Hardey*, 83.
 4. **INSURABLE INTEREST.** — J. being unable to pay the premiums of policies effected by him on his own life, gave to T. a post-obit bond for £14,000, payable on the death of J.'s father if J. survived him, and if T. had in the mean time kept up the policies. In fixing the sum of £14,000, regard was had not only to the amount of premiums required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of J. insured in the sum of £14,000, to be paid in the event of his dying in his father's lifetime. This was known to J., who knew also that T. intended to effect this latter insurance, but there was not any agreement that T. should do so. T. did effect the insurance. J. died in his father's lifetime, appointing T. one of his executors: *Held*, that no contract for T. to insure being proved, T., and not estate of J., was entitled to the benefit of the policy which T. had effected. *Held*, also, that if the transaction as to the post-obit bond was a fraud upon J., then T. had no insurable interest in J.'s life; the insurance office was not liable on the policy; and the sum insured could not, if paid by the office, be claimed by J.'s estate. *Freme v. Brade*, 182.
 5. **ASSIGNMENT.** — Trustees of a settlement of a policy of assurance being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room; but the policy of assurance was not mentioned in the assignment to the new trustees. *Held*, that the new trustees were not entitled to recover the policy as against the creditor. *Johnson v. Swire*, 225.
 6. **DELIVERY.** — A right to the contents of a policy of life insurance is not

Travelling. Usury.

passed by mere delivery of the *corpus* of the policy ; and therefore *held*, that a creditor of the party assured, after the death of the assured, should be postponed, though in right of the custodier of the policy, to the executor, *qua relict*, confirming the contents of the policy as *in bonis* of the defunct. Circumstances in which this rule was applied. *United Kingdom Life Assurance Co. v. Dixon*, 424.

7. POLICY IN FAVOR OF WIFE AND CHILDREN. — A policy of insurance on the life of a man, taken out in favor of his wife and children, vests the right to the policy in them from the date of its execution. *Succession of Kugler*, 592.

TRAVELLING.

See ACCIDENT INSURANCE, 15.

TRUST.

See DEBTOR AND CREDITOR, 14.

THE STAT. 14 GEO. 3, c. 48, does not prohibit a policy of life insurance from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument ; nor does the effecting of such an insurance in any way contravene the policy of the statute. *Collett v. Morrison*, 71.

TRUSTEE.

When a policy of assurance is assigned to a trustee, who either by express terms or fair construction has a power to give receipts, the company ought not to refuse payment to the trustee. *Curtin v. Jellicoe*, 389.

TUBERCLES.

See LOCAL DISEASE.

USURY.

1. NATURE OF CONTRACT. — Debt on a bond given by the defendant to the plaintiffs in the penal sum of £700, conditioned for payment of £350, with interest at £5 per cent. per annum, by certain instalments, and also for payment, during such time as the £350 and interest, or any part thereof, remained unpaid of the annual premium of £26 2s. 8d., payable on a policy of assurance on life for £800, deposited as a collateral security for the repayment of the £350 and interest and all costs to be incurred in enforcing performance of the bond ; with a proviso that the moneys to be ultimately recoverable on the bond should not exceed £500. Breach, non-payment of the £350. Plea, setting out the condition of the bond on oyer, and alleging that, at the time of making it, it was corruptly agreed between the plaintiffs and the defendant that the plaintiffs should lend the defendant £350, to be repaid by instalments, with £5 per cent. interest, being the moneys of a life insurance company, of which the plaintiffs were members, and that the defendant should insure his life with that company for £800, at an annual premium of £26 2s. 8d., (the same being a larger sum than was necessary to secure the repayment of the £350,) and should deposit the policy with the plaintiffs as collateral security for the repayment of the £350 and interest.

Variance. Waiver.

The plea then averred that, in pursuance and part performance of such corrupt contract, the defendant effected the policy of insurance for £800, for the benefit of the insurance company, executed the bond in question, and deposited the policy with the plaintiffs as a collateral security; and that the interest on the £350, together with the premium payable on the policy, exceeded the rate of £5 for the forbearing of £100 for a year, against the form of the statute, whereby the bond was void. *Held*, that the contract stated in the plea was not usurious, and that the plea was bad in substance. *Downes v. Green*, 41.

2. JURY.—A, by deed reciting that certain premises were worth £20 a year, granted to B an annuity of £20 for thirty years, charged upon the premises, which he covenanted to be of the recited value. A proviso was added that so soon as the grantor should pay the consideration money, with legal interest and costs, the deed should be void. *Held*, that the judge was correct in leaving to the jury the question of usury. *M'Cormick v. Ferrier*, 336.

VARIANCE.

See ACCIDENT INSURANCE, 13.

VERDICT.

INTEMPERANCE. VERDICT CONTRARY TO EVIDENCE.—A life policy contained a provision that death “by reason of intemperance from the use of intoxicating liquors” should avoid the contract. It was proved that the insured had been an intemperate man for years, and often given to paroxysms of gross intoxication, and that in one of these paroxysms he was pronounced by a physician to be in *delirium tremens*. An affidavit of the same physician was also produced to the effect that the insured had died of intemperance and exposure; and this physician testified at the trial that he had died of congestion of the lungs and brain caused by intoxicating drink. Verdict against the insurance company, which was set aside as contrary to evidence. *Miller v. The Mutual Benefit Life Insurance Co.* 581.

WAGER POLICY.

See DEBTOR AND CREDITOR, 17; INSURABLE INTEREST.

1. SEMBLE, that wagering life policies in Ireland are lawful; and that in an action on such a policy interest need neither be averred nor proved. *Shannon v. Nugent*, 327.
2. Where the plaintiff (below) effected an insurance in this country upon the life of another, and the policy contained no stipulation as to the plaintiff's interest in the life insured: *Held*, that in declaring upon such policy it was not necessary for the plaintiff to aver an interest in the life insured. The 14 Geo. 3, Eng. c. 48, which prohibits wagering policies, is an enacting law. A wagering policy is not illegal in Ireland. *Schweiger v. Magee*, 330.

WAIVER.

See AGE, 1; CONCEALMENT, 4.

1. LAPSED POLICY.—A loan was granted by an insurance company upon a

 Waiver. War.

bond with sureties, and a policy on the life of the borrower as collateral security. The premiums, after the first, were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond; they refused to pay, and pleaded *non est factum* and payment. Upon a suit instituted to restrain such actions, and it being contended that the demand by the company, after the policy "was actually void," had revived it: *Held*, that such revival was neutralized by the fact of refusal to pay, and the bill was dismissed with costs. *Edge v. Duke*, 67, and note, 70.

2. NON-PAYMENT OF PREMIUM. — The plaintiff having in the summons and plaint admitted the non-payment of certain premiums within the required period, relied upon the receipt of the premiums by the agent of the company, as amounting either to a waiver or to a new contract for a revival of the policy. The company pleaded a condition of the policy providing a specific mode of setting up the policy in case of a lapse, within a limited period. *Held*, on demurrer, that the parties were not thereby precluded from waiving the lapse of the policy in any other mode they might mutually agree to. *Supple v. Cann*, 382.
3. OPIUM EATING. — Where payment of a policy on a life was resisted on the ground that a dangerous habit of opium eating was not disclosed, and the judge directed the jury to consider whether a question regarding habits remained unanswered, and if so whether this did not imply a waiver or abandonment of the inquiry into the habits: *Held*, that he should have told the jury that such implied abandonment or waiver did not relieve the assured from making a disclosure of every fact material to be known. *Forbes v. Edinburgh Life Assurance Co.* 394.
4. PROMISE TO PAY. — An insurance company has the right to waive any of the conditions of the policy as to proof, presentation of claim, &c.; and a promise to pay, with knowledge of the facts, is such waiver. *Greenfield v. Massachusetts Mut. Life Ins. Co.* 702.

WAR.

See PERMITS, 2.

1. FAILURE TO PAY PREMIUM. — A insured the life of her husband in 1859, and paid the premiums duly until 1862. From this time until in 1865 the premiums, owing to the existence of the late war, were not paid, at which time the husband had died. Afterwards, the war having terminated, the unpaid premiums were tendered and refused. *Held*, that the tender was ineffectual. *Dillard v. The Manhattan Life Insurance Co.* 546, and note, 548.
2. AGENCY. — Where, at the opening of the war, a life insurance company of New York had an agent in Mississippi, who remained during the war, the war did not, *per se*, revoke the agency, nor make it unlawful for the agent to receive premiums which were tendered. A payment to him would have been a discharge of the debt, and a tender to him of the annual premium due 8th December, 1861, saved the assured from being in default as to payment of premiums. *Statham v. New York Life Insurance Company*, 645.

War.

3. **PREMIUMS.** — A stipulation in a policy of life insurance, that the insurance shall be void if the annual premiums shall not be paid at the time designated, does not apply to a contingency occasioned by the act of God, or of the law, rendering such payment impossible. *Hillyard v. The Mutual Benefit Life Insurance Company*, 561.
4. The effect of a war between the governments of the assurer and assured is to excuse the non-payment of such premiums on the contract days. *Ib.*
5. **FOREIGN COMPANY.** — A foreign insurance company which has issued a policy upon the life of a citizen of this country is to be considered as not affected by the state of war which existed between the different sections of the United States from 1860 to 1864, but is to be deemed a neutral; and the contract of life insurance is not impaired by the war. And when such a company had agents in North Carolina during the war, who were authorized to receive premiums, *held*, that all payments of premiums made in the currency then in use were valid. *Martine v. The International Life Assurance Society*, 700.
6. **NON-PAYMENT OF PREMIUMS.** — Plaintiff's complaint alleged, in substance, that defendant, a corporation organized in the State of New York, in 1849, issued to plaintiff, a resident of the State of Georgia, a life policy upon the life of her husband, which policy contained a clause that, in case of non-payment of the annual premiums, "the said policy should cease and determine," and "all previous payments made thereon should be forfeited to the company;" that the annual premiums fell due upon the second of April in each year, and were paid regularly up to and including the year 1861; that plaintiff was ready and willing to pay the premium falling due April 2, 1862, and those falling due during the existence of the civil war; that, in consequence of the war, all intercourse was interrupted and forbidden by the laws of the United States, and she was thereby prevented from making payment; that, as soon as communication was reestablished after the war, she tendered payment of the accrued premiums, but defendant refused to receive them, declaring the policy forfeited. Plaintiff asked that she be allowed to make the payments and the policy be declared valid, or that defendant be compelled to pay back the premiums paid, with interest, and the dividends, &c. Defendant demurred, that the court had no jurisdiction, and that the complaint did not state a cause of action. Judgment was rendered sustaining demurrer. *Held*, that the contract was not dissolved, but suspended, by the war; that the payment of the premiums during its existence was legally excused, and the tender revived the policy; that although there had been no loss, yet as there is an actual controversy, and the only parties to it are before the court; as the present rights of plaintiff under the contract are denied; as the contract of life insurance is a peculiar one; and as it is fit and proper the parties should know their rights under the contract, the case was a proper one for the exercise of the equitable powers of the court; and that the judgment was therefore error. *Cohen v. The New York Mutual Life Insurance Company*, 715.
7. **THE PAYMENT OF PREMIUMS** upon a life policy, and the remedy in case the policy becomes due during the war, are simply suspended until peace is restored. No forfeiture will arise for the non-payment of the premiums dur-

 War. Warranty.

- ing the war, provided they are promptly paid, with proper interest, on the return of peace. *Sands v. The New York Life Insurance Company*, 726.
8. PAYMENTS. — Defendant had a general agent residing in Mobile at the time of the breaking out of the war of the rebellion; his authority to receive premiums was recognized by it after the issuing of the President's proclamation forbidding commercial intercourse. Plaintiff, who held a life policy issued by defendant upon the life of her husband, paid to such general agent, in Confederate currency, the premium thereon which fell due January 2, 1862. *Held*, that this was a valid and effectual payment. *Ib.*
9. BILL TO DECLARE POLICY SUBSISTING. MUTUAL COMPANY. — In March, 1858, a mutual life insurance company of New York issued to G. a written policy on his life. G. was, at the time, a citizen of, and a resident in, Alabama, and continued to be such until his death in June, 1866. The policy was for life, subject to the payment of an annual premium on or before a specified day, and contained a provision, that, in case G. should not punctually pay such premium, the policy should cease and determine, and all previous payments made thereon should be forfeited to the company. In due season, in March, 1859, 1860, and 1861, G. paid to M., an agent of the company at Mobile, Alabama, the accruing premiums, and they were received by the company at New York. Afterwards, and in March, 1861, the company withdrew all their agencies from Alabama, and had no agent in that State until 1869. G., after 1861, paid no further premiums on the policy. He was always ready to pay, but did not pay because of the revocation of the agencies, and because the insurrection against the government of the United States prevented lawful intercourse between Mobile and New York. The restrictions against intercourse continued until May, 1865. Afterwards, and before March, 1866, G. applied to the company at New York, to receive the premiums in arrear, with interest. It refused to do so or to recognize the policy as subsisting. The plaintiff, as executor of G., renewed the application, but it was refused, on the ground that the policy was forfeited. He then filed this bill, praying for a decree declaring the policy to be subsisting and not forfeited, and directing the payment of the amount insured by it, less the unpaid premiums and interest thereon. *Held*, that the plaintiff was entitled to such decree, though the defendants were a mutual insurance company. *Hamilton v. The Mutual Life Insurance Company of New York*, 787.

 WARRANTY.

See CONCEALMENT ; HEALTH ; MISREPRESENTATION.

1. FIT. ACCIDENT. — Where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to, gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy it must be shown that the constitution of the assured was naturally liable to fits, or by accident or otherwise had become so liable. *Chattock v. Shawe*, 10.
2. APPLICATION. — A life policy provided that if the declaration made by the assured of even date with the policy, and upon which the contract was based,

Warranty. Wife, Reputed.

should be found in any respect untrue, the policy should be void. *Held*, that the application and policy must be regarded as one instrument, and the declarations in the former are therefore warranties. *The Mutual Benefit Life Insurance Company v. Miller*, 549.

3. CONSTRUCTION OF WARRANTY. — While a stipulation in a policy of life insurance, that if the answers to the questions contained in the application "shall be found in any respect untrue," the policy shall be void, constitutes such answers as a warranty of their correctness in every particular, yet the language of such questions is, nevertheless, to have a reasonable construction in view of the purposes for which they were asked. It is accordingly *held*, that a negative answer to the question as to whether the party "ever met with any accidental or serious injury," will not, though untrue, avoid the policy, if it be shown that the injury was slight, and in no way affected the future health of the applicant. *Wilkinson v. The Connecticut Mutual Life Insurance Company*, 565.
4. NON-DISCLOSURE OF IMMATERIAL FACT. — Where in answer to the question, "Has the party had any sickness within the past ten years?" the insured replied that he had had pneumonia, and said nothing of a slight attack of chronic pharyngitis several years before; and where the policy provided that the answers to the application were the basis of insurance, and that if they were in any respect untrue, the policy should be void; *held*, in the court below, that this did not constitute a warranty, and that the slight attack mentioned was an immaterial fact which the insured was not bound to disclose. Judgment affirmed on appeal. *Wise v. The Mutual Benefit Life Insurance Company*, 595.
5. BURDEN OF PROOF. — A life policy contained a provision to the effect that if any statement in the application, upon the faith of which the policy was issued, should be found in any respect untrue, the contract should be void. The application provided that it should form the basis of the contract, and that any untrue or fraudulent answers or any suppression of facts, should render the policy void. *Held*, that the statements in the application were representations and not warranties, and that the burden of proving them untrue was therefore on the company. *Held*, also, that the terms of the policy had made these representations conclusively material. *Price v. Phoenix Mutual Life Ins. Co.* 626.

WIFE.

See INSURABLE INTEREST, 2, 4, 9.

WIFE, REPUTED.

See INSURABLE INTEREST, 7; MISREPRESENTATION, 6.

